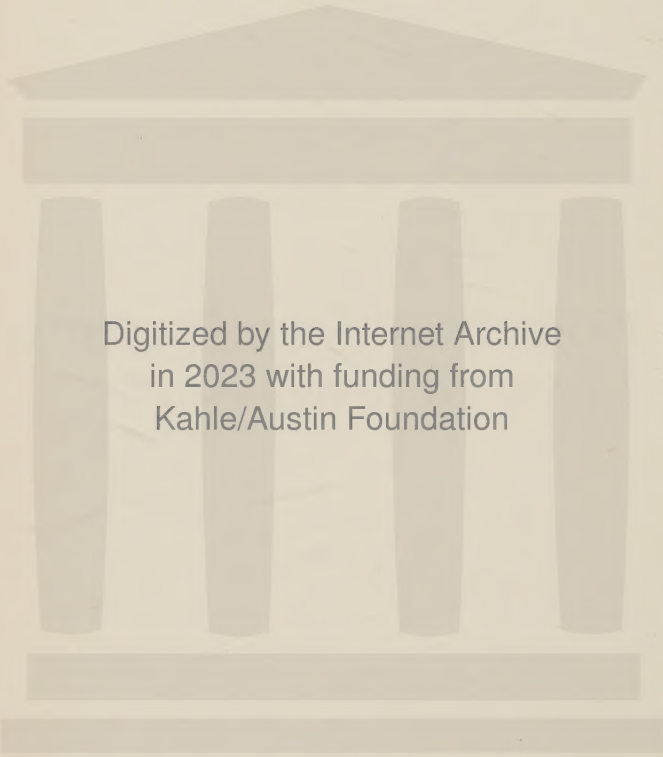


THE PAROCHIAL ECCLESIASTICAL
LAW OF SCOTLAND.



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THE
PAROCHIAL ECCLESIASTICAL
LAW OF SCOTLAND.

ORIGINALLY PREPARED BY
THE LATE JOHN M. DUNCAN, ADVOCATE.

REVISED AND IN PARTS RECAST OR REWRITTEN

BY

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PREFACE.

IN the preparation of this work I have followed, and, with the kind permission of his representatives, have to a large extent adopted, the text of Mr. DUNCAN'S work. I have, however, examined all the authorities cited (except the Canonists). Where I have differed from Mr. Duncan as to the law I have stated my own view of the law, and therefore statements of law in this work cannot be cited as having the authority of Mr. Duncan without verification from his own editions. Where I have differed from Mr. Duncan as to manner of treatment of the subject, order, or arrangement, I have altered freely in a number of cases. On the other hand, when the labour entailed by rewriting appeared disproportionate to any possible advantage, I have left much as he wrote it, which possibly I might have expressed or arranged somewhat differently had I been preparing an entirely new work.

Since Mr. Duncan prepared his treatise there have been numerous statutory changes in the law. Education has ceased to be a subject-matter of this branch of the law, patronage has been abolished, the law in regard to ecclesiastical assessments has been considerably modified, civil notification of intended marriage has been introduced, the administration of parish charities has been altered, and churchyards have been made transferable from the heritors to Parish Councils. There have been, too, some two hundred decisions of the Supreme Court upon matters cognate to the subject of this treatise.

The relation of this work to that of Mr. Duncan will be made clear by the following table of corresponding chapters :

CHAPTER I. On Parishes.	Duncan, Chapter I., with some deletions, alterations, and additions.
CHAPTER II. On Patronage and Presentation.	Duncan, Chapters II. and III. recast ; greatly abridged.
CHAPTER III. On the Appointment of Ministers by the Congregation.	New.
CHAPTER IV. On Admission or Induction.	Duncan, Chapter IV., to the extent of about one-half. The rest new.
CHAPTER V. On Churches.	Duncan, Chapter V., in the main, but with some re-arrangement and many alterations and additions.
CHAPTER VI. On Churchyards.	Duncan, Chapter VI., with many minor alterations.
CHAPTER VII. On Church Benefices.	Duncan, Chapter VIII., completely recast ; and Chapter XVII. considerably altered.
CHAPTER VIII. On Minister's Stipend.	Duncan, Chapter VII., with some re-arrangement and many alterations.
CHAPTER IX. On Manses.	Duncan, Chapter IX., with some re-arrangement and many alterations.
CHAPTER X. On Glebes.	Duncan, Chapter X., with many minor alterations and some additions.

CHAPTER XI. On Minister's Grass.	Duncan, Chapter XI., with slight alteration.
CHAPTER XII. On Heritors and their Meetings.	Duncan, Chapter XII., recast and much altered.
CHAPTER XIII. On Heritors' Assessments.	New, but with paragraphs from different parts of Duncan.
CHAPTER XIV. On Presbyterial Jurisdiction.	Duncan, Chapter XIII., with some alterations, additions, and abridgment.
CHAPTER XV. On the Kirk-Session in its civil relations.	New.
CHAPTER XVI. On Inferior Church Officers.	Duncan, Chapter XV., with considerable alterations.
CHAPTER XVII. On Communion Elements.	Duncan, Chapter XVI., with very slight alteration.
CHAPTER XVIII. Supplementary.	New.

Chapter XIV. of Duncan, on Kirk-Sessions, is superseded by Chapter XV. Chapter XVIII. of Duncan, on the Poor's Roll in litigations, is omitted as hardly relevant to this branch of the law ; and Chapter XIX., on Schools and Schoolmasters, is omitted as now obsolete.

I have found Mr. Duncan marvellously accurate in citation. I do not think that I found two erroneous references in his whole work. I have also found him most exhaustive in research. There are not, I think, half-a-dozen cases from 1560 to 1868 which have escaped him. With his interpretation of the import of a decision, however, I have not always been

able to agree, and I have found indications that he was not practically acquainted with Presbyterian polity—a circumstance which renders his exhaustive research and general accuracy all the more remarkable.

In one respect I venture to think that this work marks a great improvement upon Duncan for practical purposes. The index to Duncan is, with the exception of that to Buchanan upon Teinds, perhaps the most defective in any modern law book. Whatever imperfections there may be—and there are doubtless many—in the index to the present work, it is, I believe, a very great advance. I have followed Mr. Duncan in giving not merely a List of Cases, but also a List of Parishes, with a cross reference to the Cases. The number of Parishes in Scotland which have yielded a case is portentous; and I think that the list may be of use not merely for legal purposes, but also as a guide to some obscure or forgotten passages of local or family history.

C. N. J.

4 HERIOT ROW, EDINBURGH,

April 1903.

TABLE OF CONTENTS.

CHAPTER I.

ON PARISHES.

SECTION	PAGE
I.—Origin and Development of the Parochial System, .	1-3
II.—Establishment of Parishes in Scotland,	3-7
III.—Classification of Parishes,	7-15
IV.—Modes in which Parochial alterations are effected, .	15-16
V.—Erection and Union of Parishes prior to 1617, . .	16-18
VI.—Parliamentary Commissions for effecting Parochial alterations,	18-23
VII.—Summary of Powers <i>quoad</i> Parochial alterations, conferred by the Commissions from 1617-1693, .	23-24
VIII.—Parochial alterations under 1707, c. 9,	24-29
IX.—Import of Parochial alterations <i>Quoad Omnia</i> and <i>Quoad Sacra</i> ,	29-32
X.—Nature and effect of the Union of Parishes, . . .	32-37
XI.—Nature and effect of Parochial Disjunction and Erection,	37-39
XII.—Nature and effect of Parochial Disjunction and Annexation of Lands,	39-41
XIII.—Effect of a Disjunction and Annexation <i>Quoad Sacra</i> , .	41-43
XIV.—Parochial alterations now competent to the Teind Court,	43-44
XV.—Disjunction and Erection of Parishes <i>Quoad Omnia</i> under 7 and 8 Vict. c. 44, ss. 1-7,	44-53
XVI.—Disjunction and Erection of Districts <i>Quoad Sacra</i> , under 7 and 8 Vict. c. 44, ss. 8-11,	53-60
XVII.—Erection of Gaelic Churches and Congregations into Parishes under 7 and 8 Vict. c. 44, ss. 12 and 13, .	60-61
XVIII.—Disjunction and Erection of Parliamentary Districts <i>Quoad Sacra</i> under 7 and 8 Vict. c. 44, s. 14, . . .	61-64
XIX.—Disjunction and Erection of Parliamentary Districts <i>Quoad Omnia</i> under 7 and 8 Vict. c. 44, s. 15, . . .	64

CONTENTS.

SECTION	PAGE
XX.—Disjunction and Erection of United Parishes <i>Quoad Sacra</i> under 31 Vict. c. 30,	64-65
XXI.—Parochial Boundaries, how established,	65-72

CHAPTER II.

OF PATRONAGE AND PRESENTATION.

I.—Classification of Benefices in relation to Patronage,	73-74
II.—Patron's right of Presentation after the Reformation,	74-80
III.—Nature of the right of Patronage,	80-82
IV.—Nature of the right of Presentation,	82-83

CHAPTER III.

OF THE APPOINTMENT OF MINISTERS BY THE CONGREGATION.

Provisions of the Act of 1874,	84-88
--	-------

CHAPTER IV.

ON ADMISSION OR INDUCTION.

I.—Historical significance of the Ceremony,	89-92
II.—Trial of Minister-Elect by Presbytery,	92-93
III.—Call and Induction of Minister-Elect,	93-96
IV.—Admission of an Assistant and Successor,	96-97
V.—Effect of Induction without or contrary to a valid Appointment,	97-100

CHAPTER V.

ON CHURCHES.

I.—Churches and their Reparation prior to the Reformation,	101-103
II.—Changes in the Patrimonial Rights of Churchmen on the Reformation,	103-104
III.—Provisions as to maintaining Churches passed on the Reformation,	104-106
IV.—Former liability of Parsons in the Reparation of Parishes Churches,	106-108

CONTENTS.

xi

SECTION	PAGE
V.—Obligation to provide and maintain Churches, what, and on whom imposed,	108-113
VI.—Nature of the obligation to maintain Churches,	113-115
VII.—Obligation to maintain Churches, how implemented,	115-117
VIII.—When obligation to repair the Church emerges,	117-118
IX.—When the Church is to be repaired merely,	118-123
X.—Enlarging the Church,	123-125
XI.—When the Church must be rebuilt,	125-129
XII.—Relation between Presbytery and Heritors in regard to rebuilding or repairs,	129-132
XIII.—Size of Church when it is to be enlarged or rebuilt,	132-136
XIV.—Site of new Church when one is to be rebuilt,	136-137
XV.—Parts and Pertinents of the Church,	137-141
XVI.—Building, how impressed with character of Parish Church,	141-143
XVII.—Uses to which the Church may be applied,	143-147
XVIII.—In whom the Custody of the Parish Church is vested,	147-149
XIX.—Division of the Area of the Church among the Parishioners,	149-152
XX.—Allocation of Sittings for Heritors and their Tenants, and others,	152-156
XXI.—Procedure in Division of the Area of the Church,	156-159
XXII.—Nature of right to, and power of disposal of, Seats in the Church,	159-164
XXIII.—Maintenance and Management of Burgh Churches,	164-168
XXIV.—Right to Church Seats <i>quoad</i> Succession,	168-169

CHAPTER VI.

ON CHURCHYARDS.

I.—Disposal of the Dead by the Romans,	170-171
II.—Adoption of the Rite of Burial by the Christian Church,	171-172
III.—Obligation to provide Parish Churchyards,	172-176
IV.—Amount, situation, and character of Ground designated,	176-179
V.—Claim of Relief competent to Owner of Ground designated,	179-180
VI.—Designation of Ground as the Parish Churchyard,	180-182
VII.—For whose accommodation the Churchyard is provided,	182-184
VIII.—Management of the Churchyard,	184-186

SECTION	PAGE
IX.—Maintenance of the Churchyard,	186-188
X.—Becoming use of the Churchyard, and its vindication,	188-193
XI.—Allocation of Burial Accommodation in the Churchyard,	193-200
XII.—Allottee's right in Ground allocated,	200-203
XIII.—Right of Property in the Churchyard, in whom vested,	203-206
XIV.—Right to Subjects beneath, and produce of the Churchyard,	206-207
XV.—Parish Churchyards, how far subjects of Commerce,	207-210
XVI.—Excambion and Transportation of Churchyards,	210-213
XVII.—Burial within the Parish Church,	213-215
XVIII.—Dues payable on Interment in Parish Churchyard,	215-216
XIX.—Transference of Churchyard to Parish Council,	216
XX.—Public Burial-Grounds or Cemeteries,	216-218
XXI.—Private Burial-Grounds,	218-220
XXII.—Right of Sepulture as acquired by Prescription,	220-221
XXIII.—Scope of the Burial-Grounds (Scotland) Act, 1855,	221-222
XXIV.—Suppression of existing and prevention of proposed Burial-Grounds,	222-224
XXV.—Providing other Ground in lieu of suppressed Burial-Ground, or otherwise,	224-226
XXVI.—Rights in and Administration of Burial-Ground acquired under the Act,	226-229

CHAPTER VII.

ON CHURCH BENEFICES.

PART I.—ON BENEFICES GENERALLY.

I.—Temporality and Spirituality of Benefices,	230-231
II.—Dilapidation and Disposal of Benefices prior to the abolition of Episcopacy,	231-235
III.—Confirmation by the Crown of grants of Kirk Lands,	235-236
IV.—Effect of the suppression of Episcopacy,	236-239
V.—Extent of the Temporality of the Benefice, and Incumbent's interest therein,	239-242
VI.—Incumbent's duty to protect the Benefice,	242-243
VII.—Nature of the Incumbent's right to the Benefice,	243-246
VIII.—When the Incumbent's right to the Benefice emerges and ceases,	246-248

CONTENTS.

xiii

SECTION	PAGE
IX.—Plurality of Benefices inconsistent with our Law, ..	248-250
X.—Liability of Benefice to Taxation,	250-252
PART II.—ON THE POSSESSORY RIGHTS OF CHURCHMEN.	
XI.—Rule of <i>Decennalis et Triennalis Possessio</i> by the Canon Law,	252-255
XII.—Rule of <i>Decennalis et Triennalis Possessio</i> by the Law of Scotland,	255-256
XIII.—Thirteen years' Possession presumes a Title to the Subject,	256-260
XIV.—Thirteen years' Possession, continuous and peaceable,	260-262
XV.—Effect to which the Rule <i>Decen. et Trien. Poss.</i> may be founded on,	262-263
XVI.—Application of the Rule <i>Decen. et Trien. Poss.</i>	263-265
XVII.—Rule of the Seven years' Possession in favour of Churchmen,	265-267
XVIII.—Prescriptive Title by Thirty years' Possession <i>in</i> <i>ecclesiasticis</i> ,	267-269
XIX.—Prescriptive Title by Forty years' Possession,	269-270

CHAPTER VIII.

ON MINISTER'S STIPEND.

I.—Introduction of Teinds,	271-273
II.—Division of Teinds,	273-274
III.—Application of Rule <i>Decima debetur Purocho</i> ,	274-275
IV.—Origin and Nature of the Assumption of Thirds,	275-277
V.—Appointment of Commission of Plat, and payment of Minister's Stipend down to 1617,	277-280
VI.—Right of Reformed Clergy to Stipend out of Teinds,	280-281
VII.—Commission of 1617 for modifying Stipends,	281-282
VIII.—Commission of 1621 for modifying Stipends,	282-283
IX.—Commissions of 1627 and 1633,	283-285
X.—Commissions of 1641 and subsequent years,	285-286
XI.—Powers of Parliamentary Commissioners vested in Court of Session,	286-287
XII.—Practice of the Permanent Teind Commissioners from 1707 to 1808,	287-289
XIII.—Stipend, what and whence derived ?	289-290
XIV.—Stipend from Teinds : what Ministers entitled to Stipend ?	290-292
XV.—Right to Stipend from Teind, what, and by whom due,	292-293

SECTION	PAGE
XVI.—Modification of Stipend and Locality, . . .	293-295
XVII.—Stipends formerly modified in Victual or Money, . . .	295-296
XVIII.—Stipends from sources other than Teinds, . . .	296-300
XIX.—When Minister's right to Stipend emerges, . . .	300-303
XX.—Nature of Ann, and when due? . . .	303-307
XXI.—Vacant Stipend, what and when arising? . . .	307-312
XXII.—Quinquennial Prescription of Stipend, . . .	312-313
XXIII.—Augmentation of Stipend under 1707, c. 9, and prior Statutes? . . .	313-315
XXIV.—What Ministers entitled to demand an Augmen- tation under 1707, c. 9, and prior Statute, . . .	315-317
XXV.—Nature of Minister's right to claim an Augmen- tation, . . .	317-318
XXVI.—Mode of demanding an Augmentation of Stipend, . . .	318-323
XXVII.—Grounds for granting or refusing an Augmenta- tion of Stipend, . . .	323-328
XXVIII.—Procedure after an Augmentation is obtained, . . .	328-331
XXIX.—Conversion of Victual Stipend into Money, . . .	331-334
XXX.—Surrender of Teinds, . . .	334-336
XXXI.—Charge for payment of Stipend, . . .	336-338
XXXII.—Right to Stipend by Prescription, . . .	338-342
XXXIII.—Reclamation of Teinds for Stipend, . . .	342-345
XXXIV.—Extrajudicial and collusive Augmentations, . . .	345-346
XXXV.—Retrospective effect of an Augmentation, . . .	346-348
XXXVI.—Minister's Stipend attachable for Debt, . . .	348-350
XXXVII.—Insane or Suspended Ministers, . . .	350-351

CHAPTER IX.

ON MANSES.

I.—Manses, how provided prior to 1560, . . .	352-353
II.—Statutes providing Reformed Clergy with Manses and Glebes, . . .	353-354
III.—Law anent Manses and Glebes at the close of the Sixteenth Century, . . .	354-356
IV.—Law as to Building and Repairing Manses under Act 1612, c. 8, . . .	356-358
V.—Manses, how to be provided under Act 1644, c. 31, . . .	358-359
VI.—Building and Reparation of Manses under Act 1649, c. 45, . . .	359-360
VII.—Code of Manse Law introduced by the Act 1663, c. 21, . . .	360-363

CONTENTS.

xv

SECTION	PAGE
VIII.—What Classes of Parishes the Act 1663, c. 21, embraces,	363-364
IX.—Tenure of the Temporality of the Benefice,	364-366
X.—What Parish Ministers are entitled to Manses,	366-371
XI.—Who bound to provide and maintain Manses, and nature of the Burden,	371-374
XII.—Size and Accommodation of the Manse,	374-377
XIII.—Heritors' liability for the Cost of a New Manse,	377-383
XIV.—Minister's liability to repair the Manse,—Free Manse,	383-385
XV.—Decree of Free Manse,	385-392
XVI.—Heritors' liability to repair the Manse,	392-395
XVII.—When Manse to be rebuilt rather than repaired,	395-398
XVIII.—When Manse to be repaired and enlarged,	398-403
XIX.—Selection of a Site for the Manse,	403-406
XX.—Nature of a Minister's right to a competent Manse,	406-408
XXI.—What constitutes "a Manse" in law,	408-410
XXII.—Demand for Manse Accommodation or Repair, how made and implemented,	410
XXIII.—Minister's claim for Manse Maill,	410-414
XXIV.—Providing and repairing Manses in <i>Quoad Sacra</i> Parishes under 7 and 8 Vict. c. 44,	414-415
XXV.—Obligation to reside in and right to let Manse,	415
XXVI.—Site of old Manse,	415

CHAPTER X.

ON GLEBES.

I.—Enactments respecting Glebes down to 1644,	416-420
II.—Enactments respecting Glebes from 1644 to 1663,	420-424
III.—What Parish Ministers are entitled to Glebes,	424-427
IV.—"The Glebe," and of what it consists,	427-429
V.—"Grass Glebe," what, and when designable,	429-431
VI.—Meaning of term "Arable" <i>quoad</i> Designation of a Grass Glebe,	431-433
VII.—Nature of the provision of a "Glebe,"	433-435
VIII.—Whence and by whom the Glebe is to be provided,	435-437
IX.—Order of liability of Lands to Designation,	437-444
X.—What Lands are included within the class of Church Lands,	444-447
XI.—Exemption of Lands from liability to Designation,	447-449
XII.—Right of Relief among Heritors in respect of Lands designed,	449-452

SECTION	PAGE
XIII.—Minister's interest in the Designation of Ground for Glebe,	452-454
XIV.—New Minister's right to enter into possession of the Glebe,	454-461
XV.—Minister's Title to the Glebe,	461-464
XVI.—Lands, how impressed with Status of the Glebe,	464-467
XVII.—Excambion of the Glebe,	467-471
XVIII.—Effect of Designation <i>quoad</i> Extent of Glebe and Rights attached thereto,	471-475
XIX.—Nature of Incumbent's right of use of the Glebe,	475-479
XX.—Feuing and Leasing Glebes under 20 and 30 Vict. c. 71,	479-486
XXI.—United Parishes Act, 1876,	486-487

CHAPTER XI.

ON MINISTER'S GRASS.

I.—Origin and Nature of the Provision,	488-492
II.—Claim for Minister's Grass, to whom competent and how implemented,	492-494
III.—Meaning of term "Arable" <i>quoad</i> Designation of Minister's Grass,	494-500
IV.—Order of Designation of Church Lands for Minister's Grass,	500-502
V.—When Heritors bound to provide Minister's Grass in kind,	502-504
VI.—When Heritors bound in payment of Monetary Provision,	504-506
VII.—Right of Relief competent to the Heritors,	506-509

CHAPTER XII.

ON HERITORS AND THEIR MEETINGS.

I.—General meaning of the term "Heritor,"	510-514
II.—Application of the term "Heritor" in Burghal and Burghal-Landward Parishes,	514-516
III.—Special meaning of the term "Heritor,"	516-518
IV.—Real Rent and Valued Rent Heritors,	518
V.—Body of Heritors acting as a <i>quasi</i> -Corporation,	518-519
VI.—Mode of calling Heritors' Meetings,	519-522

CONTENTS.

xvii

SECTION	PAGE
VII.—Constituting Meeting, and appointment of Chairman and Clerk,	522-524
VIII.—Right and mode of voting at the Meeting,	524-528
IX.—Nature and extent of the Chairman's right to vote,	528-531
X.—Effect of Resolutions adopted at Heritors' Meetings,	531-534

CHAPTER XIII.

ON HERITORS' ASSESSMENTS.

I.—Rule of Assessment on Heritors for Ecclesiastical purposes,	535-540
II.—Effect of the Lands Valuation Act of 1854,	540-542
III.—The rule in Landward-Burghal Parishes,	542-545
IV.—The Act of 1900,	545-546
V.—Assessments where Lands disjoined <i>Quoad Sacra</i> ,	546-548
VI.—Imposing and levying the Assessment,	548-550

CHAPTER XIV.

ON PRESBYTERIAL JURISDICTION.

I.—Origin and Constitution of Presbyteries,	551-553
II.—Parochial Status of Ministers and Elders composing a Presbytery,	553-556
III.—Jurisdiction of Presbyteries,	556-557
IV.—Vindication of Church Property,	557-558
V.—Presbyterial Jurisdiction <i>quoad</i> Parochial Ecclesiastical Buildings and Property,	558-562
VI.—Extent and nature of the right of Presbyterial Jurisdiction,	562-564
VII.—Designation of a Manse,	564-567
VIII.—Designation of a Glebe,	567-570
IX.—Decree of "Free Manse,"	570-571
X.—Excambion of a Glebe,	571-572
XI.—Presbytery's Superintendence over Church and Manse Accommodation,	572-574
XII.—Presbyterial Requisition to repair the Church or Manse,	574-575
XIII.—Presbyterial Requisition to enlarge the Church or Manse,	575-576
XIV.—Presbyterial Requisition to rebuild the Church or Manse,	576

SECTION	PAGE
XV.—Procedure on application to Presbytery <i>quoad</i> condition of the Church or Manse,	576-579
XVI.—When Presbytery may proceed to execute its own Order,	579-583
XVII.—Review of Presbyterial Deliverances,	583-589
XVIII.—Remits by Court to examine Buildings, &c.	589-591
XIX.—The Presbytery's Expenses,	591

CHAPTER XV.

THE KIRK-SESSION IN ITS CIVIL RELATIONS.

I.—Constitution and Jurisdiction of the Kirk-Session,	592-593
II.—Kirk-Sessions and the Poor,	593-600
III.—Parish Charities,	600-604
IV.—The Poor's Roll,	604
V.—Dues exacted by Kirk-Session,	604
VI.—Session-House,	604-605

CHAPTER XVI.

ON INFERIOR CHURCH OFFICERS.

I.—The Beadle,	606-610
II.—The Precentor,	610-612
III.—The Session Clerk,	612-617

CHAPTER XVII.

ON COMMUNION ELEMENTS.

I.—Introduction of Communion Element Allowance,	618
II.—Modification of Communion Element Allowance,	618-620
III.—Amount of Communion Element Allowance awarded,	620-623
IV.—Specific Object for which Communion Element Allowance awarded,	623-625
V.—Source whence Communion Element Allowance awarded,	625-626
VI.—Communion Element Vessels and Furniture,	626-627

CONTENTS.

xix

SECTION

PAGE

CHAPTER XVIII.

SUPPLEMENTARY.

I.—Glebes (Supplementary),	628-629
II.—Manse Water Supply (Supplementary),	629
III.—Status of Parish <i>Quoad Sacra</i> ,	629-630
IV.—Patronage Compensation,	631
V.—Miscellaneous Fines and Dues payable to Kirk- Session,	631-632
VI.—Banns of Marriage,	632

APPENDIX.

I.—The New Parishes (Scotland) Act, 1844,	633
II.—The Burial Grounds (Scotland) Act, 1855,	642
III.—The Church of Scotland Courts Acts, 1863,	651
IV.—The Glebe Lands (Scotland) Act, 1866,	653
V.—The United Parishes (Scotland) Act, 1868,	660
VI.—The Ecclesiastical Buildings and Glebes (Scotland) Act, 1868,	662
VII.—The Church Patronage (Scotland) Act, 1874,	669
VIII.—The United Parishes (Scotland) Act, 1876,	673
IX.—The Local Government (Scotland) Act, 1894, Section 30,	674
X.—The Ecclesiastical Assessments (Scotland) Act, 1900,	676
XI.—The General Assembly's Regulations for the appoint- ment of Ministers,	678
List of Cases,	693
List of Parishes,	715
General Index,	721

ABBREVIATIONS.

A. S.	Act of Sederunt.
Bank. Inst.	Bankton's Institute of the Law of Scotland.
Bell	Bell's House of Lords Reports.
Bligh	Bligh's House of Lords Reports.
Br. Supp.	Brown's Supplement to Morison's Dictionary.
Br. Syn.	Brown's Synopsis of Decisions.
Connel Par.	Connell on Parishes.
Black P. E. L.	Black's Parochial Ecclesiastical Law.
D.	Dunlop's Reports.
Dickson Evid.	Dickson on Evidence.
Dow	Dow's House of Lords Reports.
Elliot T. C. P.	Elliot's Teind Court Procedure.
Ersk. Inst.	Erskine's Institute of the Law of Scotland.
Ersk. Pr.	Erskine's Principles of the Law of Scotland.
F.	Fraser's Reports.
F. C.	Faculty Collection.
F. D.	Faculty Decisions.
Hag. Con.	Haggard's Consistorial Cases in England.
Hailes	Lord Hailes' Dictionary of Decisions.
H. L.	House of Lords.
Hume	Hume's Decisions.
J. Shaw (Just.)	John Shaw's Justiciary Reports.
Jur.	Scottish Jurist.
Kinnear Dig.	Kinnear's Digest of House of Lords Cases.
L. R. Sc. App.	Law Reports, Scots Appeals.
M'P.	Macpherson's Reports.
Mack. Obs.	Sir Geo. Mackenzie's Observations.
M'Lean & R.	M'Lean & Robinson's House of Lords Reports.
Macq.	Macqueen's House of Lords Reports.
Mair, Dig.	Mair's Digest of Church Laws.
M.	Morison's Dictionary of Decisions.
Paton	Paton's House of Lords Reports.
Poor Law Mag.	Poor Law Magazine.
R.	Rettie's Reports.
Robertson	Robertson's House of Lords Reports.
S.	Shaw's Reports.
Shaw App.	Shaw's House of Lords Reports.
S. & M'Lean	Shaw & M'Lean's do.
S. C. R.	Sheriff Court Reporter.
S. L. J.	Scottish Law Journal.
S. L. R.	Scottish Law Reporter.
S. L. T.	Scots Law Times.
S. (Teinds)	Shaw's Reports of Teind Cases.
Stu.	Stuart's Court of Session Reports.
W. & S.	Wilson & Shaw's House of Lords Reports.

THE PAROCHIAL ECCLESIASTICAL
LAW OF SCOTLAND.

PAROCHIAL ECCLESIASTICAL LAW.

CHAPTER I.

ON PARISHES.

SECTION I.—*Origin and Development of the Parochial System.*

CHAP. I.

1. ALTHOUGH it is a matter of doubt at what precise period the territorial divisions now known as parishes were first established, it is generally admitted that their origin is ecclesiastical, and traceable to the requirements and polity of the early Christian Church. For some time after the foundation of the Church parishes were unknown, the scattered communities of the faithful being locally associated with the cities which they inhabited, or to which they periodically resorted. With a view to promote the spiritual interests and extend the membership of the communities over which they presided, the Apostles and their immediate successors were in use, not only by oral and written addresses, personally to teach and exhort the several societies of Christians, or "Churches," settled in different cities, but likewise to depute certain members of these communities to visit, in the capacity of spiritual instructors, certain cities and districts, whence, after a temporary sojourn, they returned and reported the result of their missionary labours.

Parishes of
ecclesiastical
origin.

2. As the number of the different Christian societies or "Churches" increased, and the radius of the territory over which they were spread extended, the spiritual superintendence of the overseers or "bishops" of these communities

Diocese or
parochia.

CHAP. I.

became more exclusive in its range, and at first by tacit consent, perhaps, rather than by any formal territorial designation, a certain district of country came to be recognised as attached to each "Church," under the pastoral charge of its bishop and his missionaries. This district was styled the *diocese* of the bishop, or sometimes his *parochia*, terms which for a long period were used as synonymous (*a*).

Formation
of parishes.

3. The members of the Christian community gradually increasing, a time at length arrived in the history of each country professing Christianity, when it was found expedient not only to make, instead of a temporary, a permanent appointment of pastors to the different communities or "churches" in the cities and towns, but also to attach resident pastors to those existing in the rural districts. This condition of matters suggested the adoption of a system of territorial division, to determine and define the sphere of the pastoral labour of the clergyman, and resulted in the formation of ecclesiastical districts known as parishes (*b*). In this its later and now understood signification, a parish or *parochia* (*c*) presupposes the subdivision of a diocese into various separate pastoral charges or *curæ animarum*.

Constitution
of a parish by
Canon law.

4. According to the Canon law as stated by Ferraris, a parish consists of a territorial district, defined by the authority

(*a*) According to Gibert, these terms continued to be used as synonymous down to, if not after, the sixth century. — *Corpus Juris Canonici*, "De Ecclesia" tit. xv. reg. iv. Other authors ascribe a different and some a later date to the distinctive use of these expressions, which, in all probability, did not arise until after diocesan subdivisions into parochial districts had been introduced.

(*b*) The introduction of parishes is very generally attributed to Pope Dionysius (A.D. 259-270).—See Barbosa, "De Officio et Potestate Parochi," pt. i. chap. i. § 18; and Ferraris, *Biblioth. Canon. voce* "Parochia," § 8. Van Espen, however, dissents from this opinion. He regards the letter on the subject

attributed to Pope Dionysius as not genuine, and seems to hold that parishes owe their origin to St. Athanasius, Bishop of Alexandria, about the beginning of the fourth century.—*Jus. Eccles. Univer.* pt. i. tit. iii. cap. i.

(*c*) The derivation of this word is by several of the canonists attributed to the Latin *parochus*, a term applied to the functionary placed at different stations throughout Italy, to receive or provide for magistrates or ambassadors in their journeys, in allusion to the spiritual nourishment which the clergyman is assumed to supply to his flock. Others refer the word *parochia* to the Greek *παροικία*, a dwelling, as indicative of the connection by residence which exists between a parishioner and his parish.

of the pope or bishop, having a permanent rector appointed thereto, who possesses control and jurisdiction over its inhabitants in matters ecclesiastical, and the right of administering to them the sacraments and other religious ordinances. Toward the constitution of a parish, or of a parish church, this author enumerates certain essentials, including, *inter alia*, the erection or designation, by episcopal authority, of a certain district, with given boundaries assigned to it; the presence in this district, as their place of residence, of at least ten families; and the appointment of a permanent rector, styled *parochus*, with the exclusive *cura animarum* of the resident inhabitants of the district, who are termed *parochiani* (a). Save the bishop of the diocese, no other than the *parochus* was entitled to exercise ecclesiastical functions within the parish; and even the bishop, although invested with ecclesiastical jurisdiction over his several rectors, did not himself possess the character of *rector parochiarum* or *parochus* of the diocese, but merely of his own cathedral church (b).

SECTION II.—*Establishment of Parishes in Scotland.*

5. At what date the establishment of parishes was introduced into Scotland is a matter which is involved in much obscurity (c). From the circumstance that it was by the monastic, as opposed to the episcopal, order of the clergy of the Western Church that the Christian religion was at first promulgated and for a long time continued to be taught in the northern part of this island, it is not improbable that parishes, which owed their erection to diocesan authority, did not exist in Scotland until a considerable period, possibly not until some centuries, after the introduction of Christianity into the country. Be this as it may, there is ample evidence to show

Parishes introduced into Scotland.

(a) Biblioth. Canon. voce "Parochia," § 3, 11-14.

(b) Hence Barbosa says, "Episcopus post divisionem parochiarum non amplius dicitur rector, sive paro-

"chus otius diœcesis sed solius ecclesiæ cathedralis, et prælatus super omnes suæ diœcesis rectores."—De Off. et Potest. Parochi, pt. i. cap. i. § 22.

(c) 1 Connell on Tithes, Chap. 2.

CHAP. I.

Influence of
civil power in
formation of
parishes.

that by the twelfth century there were numerous parishes in this country; and probably, as may be inferred from various of the canons of the Scottish clergy, the country was by the thirteenth century parochially divided throughout (*a*).

6. If the statement by Forbes be correct, viz., that the Scottish bishops exercised merely a *ministerium vagum* until the time of Malcolm Canmore (1057), and that it was this monarch who for the first time assigned to them diocesan districts (*b*), this suggests that, as regards the parochial division of the country, the initiative step was taken, not by the ecclesiastical, but by the civil power:—for, in the ordinary sequence of events, the formation of a diocese naturally leads to and properly precedes its subdivision into parishes. It is reasonable, however, to suppose that episcopal authority and the doctrines of the Canon law must to a considerable extent have been exercised and applied in Scotland in the formation of districts, the origin and objects of which were so essentially ecclesiastical. What the precise extent or operative effect of such agencies was, however, cannot now be distinctly traced. These, however, in all probability, were materially controlled and modified by other causes, among which may be specially mentioned the influence and authority of the Crown, which at a time long prior to the Reformation asserted and exercised the right of erecting not only bishoprics and dioceses, but also parishes (*c*).

Scotland
parochially
divided at
the Reforma-
tion.

7. If the inference deducible from various of the canons of the Scottish Church, as above alluded to, be correct, it may reasonably be assumed, in conformity with the generally received opinion on the matter, that at the period of the Reformation Scotland was parochially divided throughout. The precise boundaries of each individual parish may not

(*a*) Connell on Tithes, p. 21.

(*b*) Forbes on Tithes, p. 75.

(*c*) Thus David I. not only added to the number of bishoprics which existed at the date of his accession, but he likewise built and endowed

churches, and assigned to them districts or parishes. — See Grub's "Ecclesiastical History," vol. i. cap. x., xv., and xviii., and authorities there cited.

indeed, as Connell remarks, have then been in every instance very clearly defined (*a*); but, in all probability, the division of the country into ecclesiastical districts had, even prior to 1560, been so generally and extensively adopted, as to involve the result that no part of the country was at that date admittedly extra-parochial. This view is strongly corroborated by the course of procedure which, subsequently to the Reformation, has been adopted in connection with the erection of parishes. For whether regard be had to the terms of Acts of Parliament, the deliverances of Church courts, or the decrees of judicial tribunals on the subject, all are consistent with, and more or less clearly assume, the pre-existence of parochial districts, and imply rather a modification and alteration of their boundaries than the erection for the first time of non-parochial territory into parishes.

8. The dilapidation of the benefices of the Romish Church, and the dispersion of their incumbents, which accompanied the Reformation, rendered necessary the adoption by the State of some general plan for the settlement and maintenance of the new order of clergy, and the religious instruction and education of the people. In furtherance of these objects the Act 1581, c. 100, was passed, which forbade pluralities, and, *inter alia*, authorised the appointment of a minister to each parish church, with a reasonable stipend, and the appropriation to each church or cure of "a sufficient and competent" district as a parish. The action taken by the State in this latter particular involved the alteration of existing parochial boundaries by the erection, when necessary, of new parishes. Special Acts of Parliament were thereafter from time to time passed, dismembering or disjoining and erecting particular parochial districts into independent parishes. From 1617 to 1707 such territorial changes were for the most part effected by the decrees of Parliamentary Commissioners, whose powers and functions in these matters were at the latter date trans-

Readjustment
of parishes at
the Reforma-
tion.

Act 1581, c. 100.

(*a*) 1 Connell on Tithes, p. 130.

CHAP. I.

Parochial
alterations
effected by
the State.

ferred to and have since been exercised by the Court of Session as coming in place of the Teind Commissioners (*a*).

9. To whatever extent the Scottish bishops prior to the Reformation exercised the canonical function of erecting or dividing into parishes the territory of their respective dioceses, it does not appear that the Reformed Church ever successfully asserted its right to the possession of such a prerogative. Some of the records and proceedings of its courts indicate, perhaps, an attempt to do so (*b*); but the possession by the Church of such a power has not only been repeatedly ignored by the State (*c*), but has likewise been distinctly negatived by judicial decision (*d*). This prerogative, which, as it has been already remarked, was exercised by the civil power prior to the Reformation, most naturally continued to be retained by it on that event—an event which directly tended to confer on, or to recognise as vested in, the State supreme and ultimate authority in the matter. Since 1560 the Crown and the State have exercised this prerogative either directly by statute (*e*), or indirectly through the decrees of Parliamentary or Judicial Commissioners appointed by and acting under sovereign authority.

Parish *quid* by
law of Scot-
land.

10. According to the ordinary acceptation of the term in our law, a parish may be described as a district included within certain boundaries, and allocated to a particular

(*a*) See *post*, SECT. VIII.

(*b*) See Connell Par. p. 2 *et seq.*, and documents there referred to.

(*c*) In support of this remark, it may be observed that while deliverances of the Church courts were pronounced erecting the parishes of North Leith, and Scotsraig or Portincraig, these parishes were really erected by the Acts 1606, c. 27, and 1606, c. 30, neither of which takes any notice of the ecclesiastical deliverances referred to. See also the case of the parish of Garril in 1662.—*Ibid.* p. 45.

(*d*) This remark is corroborated by various judgments, finding invalid the declaratory enactments of the General Assembly in 1833 and 1834 anent Parliamentary churches. See Irvine *v.*

Trs. of Ministers' Widows' Fund, 1838, 16 S. 1024; Wilson *v.* Presbytery of Stranraer, 1842, 4 D. 1294; Smith *v.* Presbytery of Abertarff, 1842, 4 D. 1476; Cuninghame *v.* Presbytery of Irvine, 1843, 5 D. 427.

(*e*) It has been said that during the period between the Reformation and 1617 it was the practice for the Sovereign in Council to unite parishes (per Lord Curriehill in Campbell *v.* Campbell, 1852, 15 D. at p. 10). No instance of such a union is cited, nor has any trace of one been discovered. In the case of Haymouth (Douglas *v.* Haymouth, 1627, 1 Brown's Supp. 232) the erection of a parish was held to have been *ultra vires* of the Crown.

church, the inhabitants of which district are placed under, and may claim the spiritual superintendence of its minister. This description of what a parish is presupposes or involves as essential thereto the existence of a certain territory or district within which those reside who are entitled to the appellation of parishioners. Although section 29 of 5 Geo. IV. c. 90, seems to assume or recognise the possible existence of non-parochial territory in the Highlands and Islands of Scotland, and the provisions contained in section 13 of 7 and 8 Vict. c. 44, expressly authorise, in certain cases, the erection of parishes independently of territory, still, as a general rule, territorial boundaries are, by the law of Scotland, essential to the existence of a parish (*a*).

SECTION III.—*Classification of Parishes.*

11. While parishes were originally introduced mainly in connection with ecclesiastical wants and interests, the existence of such territorial divisions was very naturally and conveniently adopted by the State to subserve objects and requirements of a civil character. Suggested by this distinction in the aspect and purposes of the parochial division of the country, occurs the classification of parishes into (1) those *quoad sacra tantum*, and (2) those *quoad sacra et civilia*, or more shortly *quoad omnia*. Besides this division of parishes, which is afterwards referred to (*b*), another division, arising from the local character or situation of the parochial district, has been made of parishes into (1) landward, (2) burghal, and (3) burghal-landward parishes, *i.e.*, parishes partly burghal and partly landward.

Parishes *quoad omnia* and *quoad sacra*.

Landward, burghal, and burghal-landward.

12. A burghal parish is one confined within the limits of

(*a*) Per Lord Moncreiff in *Society for Propagating Christian Knowledge v. Magistrates of Edinburgh*, 1850, 12 D. p. 1219. Parishes of a somewhat similar kind, styled *parochiæ gentilitiæ*, which had no territorial boundaries, and which existed only in

connection with a spiritual superintendence over certain individuals or families, were recognised by the Canon law.—Ferraris, *Biblioth. Canon. voce* “*Parochia*,” § 17.

(*b*) See *post*, SECT. IX.

CHAP. I.

Nature of the
classification
of parishes.

Urban and
rural parishes.

Constitution
of burghs.

a royal burgh or of a burghal community which “by custom or special statute controls its ecclesiastical affairs by means of its civic authorities.” (a) A landward parish is one, whether urban or rural, in which there is no burghal element in the foregoing sense. A landward-burghal or burghal-landward parish is one in which there is a landward district and also a burgh which acts in its corporate capacity through its civic authorities in matters relating to the parochial church establishment. This classification of parishes is sometimes confused with another classification, viz., into urban and rural parishes. An urban parish is one where from growth of population, erection of works, or other causes, the agricultural value of land is no longer any index of its real value, and where, therefore, the ancient agricultural valuation known as the “valued rent” does not afford even an approximate estimate of the relative value of different estates. A rural parish, on the other hand, is one where there is no large urban element or valuable works, and where, therefore, as between estates, the old valued rent still approximately indicates their relative value, and can therefore be taken as a basis for assessment without any great injustice. The question of assessments is treated in a later chapter, but some explanation may here be given of the nature of the old division of parishes as burghal or landward or mixed.

13. A burgh is a corporate body, erected by the Sovereign, and made up of the inhabitants of a determinate tract of ground, with jurisdiction annexed to it, which is called the territory or liberty of the burgh (b.) The corporation of the burgh, as here understood, includes all connected with the burghal territory, either by residence, proprietorship, or membership of an industrial craft or *gild* within it. This last-mentioned qualification is peculiarly one which confers

(a) Rankine, Land Ownership, 659.

(b) Ersk. i. 4, 20. The reader will find much valuable information on the subject of the constitution of

royal burghs in the Session papers in the case of *Andrew v. Magistrates of Linlithgow*, 1775, M. 1883, and 2 Hailes p. 618.

the title and status of a burghess with the privileges thereto attached, which—originally constituted by the burgh's charter, and subsequently acquired by election under the powers contained therein—are transmissible by descent and marriage. The territory or liberty of the burgh consists of the determinate tract of ground granted by the charter of erection, and within which the right of jurisdiction and other incorporeal rights and privileges thereby conferred on the corporation or its magistrates may be exercised and enjoyed (*a*). There are two co-existent elements implied in the term burgh, viz., a corporation on the one hand, and a territorial district on the other, which have been styled respectively the *soul* and *body* of the burgh (*b*). Burghs are divided into burghs (1) royal, (2) of regality, and (3) of barony. While all are erected by the Crown, the leading distinction between them consists in this, that whereas in burghs royal the corporation, for the most part, holds directly of the Sovereign as superior, in burghs of regality or of barony the corporation holds of a subject, to whom the right of superiority has been granted by the Sovereign. In the case of a burgh of barony the grantee was one who, as being possessed of lands which had been erected or confirmed by the King *in liberam baroniam*, was entitled to the appellation of baron. In the case of a burgh of regality the grantee did not possess this title. In both instances, however, the grantees, as superiors of the burgh, enjoyed a cumulative jurisdiction with that conferred on the magistrates of the burgh, which the grantees were in use to exercise through officers appointed by them, who were styled bailies of regality and baron bailies respectively. It is only in the case of royal burghs that the ecclesiastical constitution of the parish *necessarily* differs from that of a rural parish, and attaches to the parish the character of burghal or landward-burghal. In the case of

Burghs royal,
of regality,
and of barony.

(*a*) Ersk. i. 2, 3.

(*b*) Per Lord Jeffrey in *Home v. Young*, 1846, 9 D. at p. 303.

CHAP. I.

a burgh of regality or of barony the parish in which it is situated remains a landward parish, unless by custom the burgh as such takes part in the management of the ecclesiastical business of the parish.

Terms suggestive of burghal property.

14. Among other terms descriptive of or associated with burghal property, the following are frequently met with. Thus, a "burrowstoun kirk" means the church of a burghal parish to which no landward district is attached (*a.*) The phrase "borrowmuir," or "burrowfield," is suggestive of a tract of land, frequently extra-burghal in point of situation, belonging to the burgh, and used by its inhabitants as a commonity for pasturing cattle, or for domestic or manufacturing purposes, such as bleaching clothes or textile fabrics, or as a place of amusement or recreation (*b.*) "Burrow roods" and "burrow acres" indicate those small portions of arable ground adjoining burghs which belong to the incorporation or to individual burgesses. According to the strict interpretation of the phrase, "incorporate acres" are portions of arable or pasture ground situated within, or forming part of, the territory of a royal burgh (*c.*) or other burgh. The expression "incorporate acres" is sometimes used in a more extended sense, being applied likewise to portions of ground in the vicinity of burghs, towns, or villages which belong to a corporation or *quasi* corporation within them.

Indicia of burghal or landward character.

15. While in the absence of precise specification of boundaries, the rural situation and agricultural or pastoral character of any portion of a parish are among the most obvious and suggestive indications that it falls to be regarded and dealt with as landward and not as burghal, other criteria of a less popular and more artificial kind are sometimes appealed

(*a.*) It is doubtful whether a church possesses this character when there is a rural district within the burgh. See p. 15, and see also per Lord Justice-Clerk Boyle, in *Auld v. Magistrates of Ayr*, 1828, 6 S. at p. 1090.

(*b.*) In the case of royal burghs in particular, grants of extensive extra-

burghal ground were frequently made by the Crown to the burgh at its erection, or subsequently, or were otherwise acquired by it.

(*c.*) See per Lord President Hope and Lord Balgray in *Bruce v. Carstairs*, 1826, 4 S. p. 626 (n.e. 633).

to in the ascertainment of this point. Among these criteria may be mentioned, first, the fact of the presence in, or absence from, the cess books of the county of the lands in question ; and, second, the particular nature of their feudal holding.

16. In order to provide funds to meet the extraordinary expenses connected with the prosecution of foreign wars, or the defence of the kingdom, special subsidies, known as the cess or land-tax, were from time to time levied on the Scottish nation by the authority of the Sovereign and the Estates of the realm. The amount of the rents and value of the lands throughout the country, as fixed by the Old and New Extents, were superseded during the Usurpation by a more accurate valuation, according to which loans and taxes were contracted and levied (*a*). On the Restoration (1660), a somewhat similar standard of valuation was adopted (*b*). By the Act of Convention of Estates, 23d January 1667, a supply of £72,000 Scots monthly, for twelve months, was to be raised and paid in certain specified proportions by the several shires and burghs royal, according to the valuations made in 1660. For levying this tax from the counties Commissioners of Supply were appointed, the duty of its collection in the burghs being committed to the Magistrates acting by Stentmasters. The Commissioners of Supply and the Magistrates were likewise empowered and enjoined to “ consider the valuation of all lands, teinds, and other real estate within their respective shires and burghs ; and such as they shall find just and equal, that they approve thereof, and appoint the same to be the rule for levying and raising this present supply.” According to the valuations so adjusted subsequent subsidies were raised (*c*).

Cess or land-tax *quid*, and how levied.

Old and New Extents superseded.

Cess, how levied after Restoration.

(*a*) See Acts of Convention of Estates, 15th August 1643 and 4th August 1649, and 1645, c. 11, and 1646, c. 9.

Convention of Estates, 4th August 1665, seems, however, to have been levied according to the rule of the Old Extent.

(*b*) The tax raised under the Act of

(*c*) See 1670, c. 3 ; 1672, c. 4 ; and

CHAP. I.

Valuation of
lands entered
in cess-books
and stent-roll.

Entry of lands
in stent-roll
not conclusive
that they are
burghal.

Burgage hold-
ings indicative
of burghal
parish.

17. After ascertaining the rents of all the different lands within their respective shires, the Commissioners of Supply prepared tax-rolls, allocating on each proprietor, according to the rent of his lands, the proportion due by him of the *cumulo* amount of the tax imposed in the particular county. From these tax-rolls the amount of rent of each property was entered in the cess-book of the county (*a.*) On the other hand, as the Magistrates of each burgh royal were charged with levying and collecting from its burgesses and inhabitants the proportion due by them of the amount of the tax imposed on the burgh, the properties and tenements in respect of which they were taxed would be appropriately entered in the stent-roll of the burgh. Thus the presence in the cess-books of particular lands indicated that they were not situated within a royal burgh, and if lying adjacent to such burgh as opposed to a burgh of regality or barony, was indicative that to this extent, at least, their character was not burghal but landward. At the same time, the absence of lands from the cess-book, and their presence in the stent-roll, does not conclusively prove that they are to be held as burghal. It occasionally happens that extra-burghal property, though held in feu of the burgh, and otherwise impressed with the qualities of a landward subject, has not been assessed for the land-tax by the Commissioners of Supply. The burgh being proprietors, or at least superiors of the subjects, the cess imposed on the burgh may include that applicable to the whole territory belonging to the corporation. In such a case lands held in feu of the burgh, whether extra-burghal or not, may be very naturally included in its stent-roll, and consequently omitted from the cess-books of the county, although truly forming and dealt with as a landward district of the parish.

18. The tenure by which the inhabitants of the territory

Act of Convention of Estates, 10th July 1678. By 1690, c. 6, a supply of £2,019,733 Scots was to be levied. This Act makes special provision for

the rectification of unequal valuations between one parish and another in the same county.

(a) See Bell on Election Laws, p. 192.

erected into a royal burgh hold of the Crown the property belonging to them there situated, is a species of ward-holding under a *reddendo* of watching and warding (*a*), and is styled burgage. This species of holding is peculiar to royal burghs, and being so, the fact that particular lands are so held is suggestive, although not necessarily conclusive, that they are in their parochial character not landward but burghal. Beyond this, however, the nature of the tenure of lands cannot be relied on to determine their distinctive parochial character. In the case of burghs of regality and barony, just as in the case of rural districts, the lands are held of a subject superior in feu or blench. This is true also in some instances even in regard to lands situated within the territory of a royal burgh, when this has been erected out of what was formerly a burgh of regality or of barony (*b*); and in cases where the property of a royal burgh, though held in feu of the burgh by its inhabitants, is, as forming part of the burghal territory, held by the corporation burgage of the Crown (*c*).

19. Numerous burghal-landward parishes exist throughout Scotland, and various examples of such parishes are met with in the books. The parish of Forfar, which consisted of the royal burgh of that name and a rural district, had a population of 4756 souls. Besides the town of Forfar, the royalty included a tract of about 700 acres, held by "burgh-heritors." The population of the town and the burghal district together amounted to 3800, or about four-fifths of the whole parish. The number of examinable persons in the town and burgh lands was 2965, and in the landward part of the parish 765 (*d*).

Instances of
burghal-land-
ward parishes.

Case of
Forfar.

20. The parish of Ayr consisted of the royal burgh of Ayr, and of the territory constituting the old parish of

(*a*) Craig, Jus Feudale, lib. i. Dieg. x. § 31.

with recent statutory changes in regard to burgage tenure.

(*b*) Ersk. ii. 4, 8.

(*d*) Ure v. Carnegie, 1793, M. 7929, and see Fac. Coll. Sess. papers, 1793 No. 52.

(*c*) See per Lord Medwyn in Auld v. Magistrates of Ayr, 1828, 6 S. at p. 1091. It is unnecessary here to deal

CHAP. I.

Alloway. The royal burgh of Ayr, which was erected by charter from William the Lion (1165–1214), embraced (1) a determinate tract of ground, including the old Castle of Ayr, within the gates or ports of the town, which was held burgage; and (2) another tract of ground known as the Borrowfield, which appears to have been held feu of the burgh. These two tracts of ground comprised what was alleged to have formed the original parish of Ayr (*a*). In 1236 Alexander II. granted to the burgesses of the burgh of Ayr the lands of Alloway, to be held of the Crown for payment of L.10 *per annum*, “et faciendo forensicum servitium quod pertinet ad dictas terras.” These lands, which comprised the old parish of Alloway, were by charter erected into a barony, called the barony of Alloway, by Robert I. in 1324, to be held by the same tenure as that contained in the original grant. The teinds of the lands of Alloway were valued as the teinds of a separate or independent parish in 1621. These lands of Alloway, so conveyed under the charter of 1236, as well as the greater part of the Burrowfield of Ayr, had been feued out by the magistrates of the burgh, and were held by the burgesses of Ayr and others by feu tenure, prior as well as subsequently to 1691, in which year the two parishes were united or erected into one common parish, which has since been known as the parish of Ayr (*b*).

Burghal property may form landward parish.

21. To impress a given district of a parish in which a burgh is situated with a burghal character it does not seem to be sufficient merely that the tract of ground composing the district be the property of the burgh. From the case of Ayr (*c*) it appears to be necessary that the district form part of

(*a*) On the one hand it was maintained that the territory or liberty of the burgh included the whole of the Borrowfield, as well as the ground within the gates or ports of the town. On the other hand, it was contended that the burgh proper did not include any part of the Borrowfield, which it was alleged was merely a part of its

property, not of its territory. Magistrates of Ayr *v.* Auld, 1825, 4 S. 99 (n.e. 101), and relative Session papers, and 2 W. & S. 600, and Auld *v.* Magistrates of Ayr, 1828, 6 S. 1087.

(*b*) Auld *v.* Magistrates of Ayr, *supra*.

(*c*) *Ibid.*

the liberty or territory of the burgh. Here, although the lands of Alloway belonged to the burgh of Ayr, and so were burgh property, the Court held that they fell within the denomination of a landward district—the holding being feu and not burgage.

22. According to the opinion of Lord Medwyn as expressed in the Ayr case, it is also necessary to render a district burghal that it be destitute of the qualities or attributes characteristic of a rural or agricultural district. In this case the “Burrowfield” of Ayr, although apparently treated by Lord Medwyn as included within the liberties of the burgh of Ayr under its original charter of erection, and as held burgage of the Crown by the burgh (though subfeued to its inhabitants), was dealt with by him as a landward district of the parish in respect of its extent, rural situation, and agricultural character. On the other hand, however, in the case of Arbroath (*a*) it was held by Lord M'Laren that where the whole parish is within the liberty and territory of the burgh, the rural character of part of the lands does not affect the character of the parish as purely burghal. The latter appears to be the preferable opinion.

Rural area
within burgh.

SECTION IV.—*Modes in which Parochial Alterations are effected.*

23. The accomplishment of the Reformation introduced several social and ecclesiastical reasons for altering the then existing territorial limits of parishes, while the then general parochial subdivision of the country rendered any change in the boundaries of one parish practicable only on the footing of a corresponding modification of those of another. Hence the creation of new parishes since the date in question is ultimately traceable to either—(1) the severance of a tract of ground from one or more parishes, and its erection into a new and independent parish; or (2) the union into one parish of what were formerly separate parishes; or (3) a

Reformation
induced paro-
chial changes.

(c) *Heritors v. Minister of Arbroath*, 1883, 20 S.L.R. 781.

CHAP. I.

severance from one or more parishes of a portion of its or their territory, and the incorporation thereof within the confines of a different parish. These several operations may involve either—(1) the disjunction and erection of parishes; (2) the union of parishes; or (3) the disjunction and annexation of portions of parishes.

Classification
of parochial
changes.

24. The practical distinction between these several processes resolves, perhaps, rather into a question of degree in the parochial transformation, than into one of principle in the *modus operandi*. Although formerly somewhat overlooked or disregarded, the above classification has been recognised in later judicial decisions and legislative enactments, and is here adopted as being conducive to a concise treatment of the subject under review.

SECTION V.—*Erection and Union of Parishes prior to 1617.*

By special
Statutes prior
to 1617.

25. The Act 1617, c. 3, is the first of a series of statutes whereby Parliamentary Commissioners were appointed for the purposes, *inter alia*, of altering and readjusting the size and boundaries of parishes throughout Scotland. Prior to that date special statutes were from time to time passed for these purposes. Thus, by the Act 1592, c. 20, certain lands in the original parish of St. Andrews were disjoined therefrom, and erected into the new parish of South St. Andrews. The Acts 1592, c. 21, and 1594, c. 43, ratified a charter granted by James VI. disjoining a part of the parish of Innerkip, and erecting it into the independent parish of Greenock. The Act 1606, c. 29, disjoined the lands of Preston and Prestonpans from Tranent, and erected them into the parish of Preston.

From 1560-
1617, and sub-
sequently.

26. It has been said that during the period from 1560 to 1617 it was the practice of the Sovereign in Council to unite parishes (*a*). Whether or not this were the case, subse-

(*a*) Per Lord Curriehill in *Campbell v. Campbell*, 1852, 15 D. at p. 10; but see *ante*, p. 6, note (*e*).

quently, the power of Parliament in this matter came to be recognised as superior both to ecclesiastical and royal authority, and to be supreme. To this effect are the cases of Auchtergaven (*a*) and Haymouth (*b*). In the former, two Auchtergaven. parish churches had been united in 1617, and one minister appointed to both. Thereafter the bishop of the diocese, with consent of the Presbytery, appointed a minister to each church (the defender being one), and divided the stipend between them. Subsequently the bishop appointed the pursuer minister to both united kirks. In a competition between him and the defender as to the stipend the Court preferred the former, in respect "that a kirk so united by " Parliament could not be loosed, disunited, or altered by the " bishop, nor no other but by the Parliament." In the latter case, warning made at Coldingham, whereof the kirk of Haymouth was a pendicle, though not at Haymouth, was Haymouth. sustained, notwithstanding Haymouth was erected by the King into a parish kirk, and was planted with a minister, and religious ordinances had been regularly dispensed thereat many years before the warning, "because no new parish kirk " can be erected but by Act of Parliament."

27. In the beginning of the seventeenth century a number of ecclesiastical foundations were erected into temporal lordships under the authority of Parliament. It was one of the conditions of these erections that adequate stipends should be modified to the clergymen holding the livings which belonged to these foundations. Accordingly by an Act of 1606 (No. 23, Thomson's Acts, Vol. IV. p. 299) a commission was appointed to which was entrusted the duty "To modifie, " decerne, and declair, to everie minister serveing or that " heireftir sall serve at everie kirk the cure thair yeirlie " stipendis in all tynes cumming by (*i.e.* besides) thair manss " and gleib of all thair kirkis whairof the patronages ar dis-

Unions by the
Commission of
1606 on erected
benefices.

(*a*) *Chrystison v. Anderson*, 1631, M. 7946.

(*b*) *Douglas v. Parishioners of Haymouth*, 1627, 1 Br. Supp. 232.

CHAP. I.

“posit be oure said Souverane Lord in this present Parliament
 “in the erectionis of temporall lordschippis and baroneis or
 “uther wayes quhatsumevir to the effect that the haill kirkis
 “baith alreadie plantit and as yit unplantit may be provydit
 “to sufficient stipends in all tyme cumming, and that everie
 “kirk may be provydit to ane minister to serve the cure at
 “ilk kirk, and that they have sufficient and competent
 “stipendis provydit to everie ane of thame to serve the cure
 “in all tyme cumming as said is.” This Commission had no
 express authority to unite parishes, but it did in fact unite a
 number of parishes or modified stipends out of the teinds of
 two or more parishes as to a single cure—a proceeding which
 had the practical effect of union, and seems to have been so
 intended; indeed in some cases the Commissioners appear
 in terms to have declared the parishes united. This circum-
 stance seems to have escaped the observation of previous
 writers upon the subject, and one instance in which a union
 effected in this way was recognised by Parliament appears
 to have perplexed Connell (*a*). Many parishes united by the
 Commission in this way have remained united ever since,
 and in some cases all trace or tradition of separate existence
 has disappeared. The action of the Commission in the
 matter may be traced by an examination of the abstracts
 of Charters of Erection in the published Register of the
 Great Seal.

SECTION VI.—*Parliamentary Commissions for effecting
 Parochial Alterations.*

Motive for
 parochial
 alterations.

28. The alteration or re-arrangement of parochial bound-
 aries and districts which followed on the Reformation seems
 to have been mainly suggested by the necessity of providing
 competent stipends to the new order of clergy, who had suc-
 ceeded to a church despoiled of most of its property and
 revenues. From about 1561 to 1617 the stipends of the

(*a*) Connell Par. 15.

Protestant ministers had been modified out of the "thirds" of ecclesiastical benefices.

CHAP. I.

29. After various fruitless attempts made during this period to obtain provisions more adequate in amount, and payable out of the teinds of the lands attached to their respective churches instead of from a general fund, their efforts in this direction were to a considerable extent realised by the Act 1617, c. 3. The principal object of this statute was to modify "ane perpetual local stipend" to the ministers of all churches which had not been formerly provided with ministers or stipend, and to those already so provided whose stipend did not amount to 500 merks Scots, or 5 chalders of victual, besides manse and glebe. Toward the accomplishment of this object certain Parliamentary Commissioners (*a*) were appointed, who were specially empowered, *inter alia*, "to unite sik kirks (*b*), ane or moe, as may conveniently be unite, where the fruits of any one alone will not suffice to entertain ane minister." This Commission was to endure till Lammas 1618, and its decreets and sentences were to have the authority and effect of an Act of Parliament. The powers of this Commission were widely exercised. They united more than 200 parishes, and they appear not to have been very scrupulous to satisfy themselves of the insufficiency of the teinds of the parish to support a minister before uniting it to another (*c*).

Commission of 1617, c. 3.

30. By the Act 1621, c. 5, and on the narrative therein contained, certain Commissioners (*d*) were appointed, who were authorised, *inter alia*, to modify local stipends to the

Powers of the Commissioners under 1621, c. 5.

(*a*) An equal number of the Commissioners were appointed out of the four estates of the bishops, lords, barons, and burgesses.

(*b*) In this, as well as in various other Acts afterwards referred to, the term "kirk" is frequently used as synonymous with and as meaning parish.

(*c*) Instances of the union of parishes under this Commission are mentioned

by Connell Par. p. 19 *et seq.* Other instances are to be found in the "Reports in Parishes, 1627," Maitland Club Publication.

(*d*) As in the former instance, these Commissioners were appointed from the said four estates of the kingdom; and "the conjunct assent of foure of every one of the said foure estates" was required to ratify any decree or sentence pronounced.

CHAP. I.

ministers, present and to come, of all churches hitherto unprovided, and also "to disunite such kirkes, one or moe, as "were united of before, and appointed to be served with one "minister," and to "appoint the same to be served by several "functions and charges as distinct parochins," as they should judge most expedient, "providing always that all parties "having interesse in the union and disuniting of the saids "kirkes and plantation thereof, give their expresse warrand "and consent thereto."

Parties to be called.

31. Who these persons are is not specially mentioned; but from the immediately succeeding provisions in the Act regarding the erection of new churches and their endowment, in cases where this was judged necessary or convenient to be done, it would appear that the phrase, "parties having "interesse," embraced patrons, titulars, tacksmen, and others in right of or interested in the teinds, as well as—in those cases, at all events, where new churches were ordained to be built in any disjoined and newly erected parish—the heritors of the parish (*a*). By the above statute, the Commissioners, whose powers expired in January 1622, were debarred from altering or meddling with any church settled by the foresaid Commission of 1617, and their sentences and decrees were to have the authority and effect of an Act of Parliament.

Scope of Act 1621, c. 5.

32. It is observed by Connell that the Act 1621, c. 5, conferred no power on the Commissioners either to unite parishes or to disjoin and annex lands parochially; and in corroboration of this remark he notices that the disjunctions and annexations which took place in 1621, relative to the parishes of St. Cuthbert's and St. Andrew's, were in both instances effected by special Acts of Parliament (*b*). It seems doubtful, however, whether the Commission of 1621 ever met or acted (*c*).

(*a*) The heritors of the parish, under the term parishioners, having been made liable in the duty and expense of upholding and "reparrelling" parish churches by 1572, c. 54.

(*b*) See Connell Par. pp. 29–31.

(*c*) In the course of his long experience the present Teind Clerk, Mr. Nenion Elliot, has seen no trace of any action of this Commission.

33. By the Commission granted by Charles I. to the clergy, nobility, gentry, and burrows to treat anent his Revocation, dated 7th January 1627, the proceedings of which were ratified by the Act 1633, c. 8, power was conferred on the Commissioners therein named, or on any twelve of them, *inter alia*, “to disjoine and divide such united paroches, and “to divide such spacious paroches as shall be then found “needful for the better ease and comfort of His Majesty’s “subjects; and, to provide for sufficient building and repairing “of churches thereof, the teinds shall be reserved or disposed “as aforesaid, if the said churches be not already sufficiently “provided, and for providing their ministers with sufficient “lawful stipends.”

CHAP. I.

Commission
1627.

34. By the Statute 1633, c. 19, the Commissioners thereby appointed were authorised, *inter alia*—(1) “To divide ample “and spacious parochines, where the same shall be found “necessary and expedient, or to unite divers kirks, in whole “or in part, to others; and (2) To ratifie and allow, after “tryal and consideration, such union or dismembring of “parochines as hath been formerly made by virtue of the “former Commissions.” Connell mentions one instance of a parochial annexation under the former Commission, which is afterwards referred to (*a*), and states that there are no decrees of the latter Commission, in the matter of parochial alterations, extant (*b*).

Commission of
1633.

35. The next Commission to be noted is that appointed by the Act 1641, c. 30. The object proposed to be served by the several parochial alterations which it authorises is “the “good and ease of the parochiners of both the kirks and their “edification;” and it contains immediately thereafter the following proviso, viz., “that the dividing of large parochs, “the dismembring of ane part of the saids parochins in case “foresaid, and the uniting of kirks and parochines of the

Commission of
1641.

(*a*) Case of Ravelston, *post*, p. 28, (*b*) Connell Par. pp. 33, 35.
note (*a*).

CHAP. I.

“qualitie above specified, be done upon the special recommendation of the Presbytery, Synod, or General Assembly given in writ, and after the Commissioners have cited and heard the parochiners of both kirks thereanent, and no otherwise.” The decrees and deliverances of the Commissioners under this statute were declared to have the same force and effect as an Act of Parliament.

Commissions
of 1644, 1647,
and 1649.

36. The Commission and powers granted by the last statute are renewed by the Acts 1644, c. 24, and 1647, c. 32, and, in addition thereto, the succeeding Act 1649, c. 45, alluding to the disjunction of lands from a large parish and their annexation to a small one, contains the suggestion that “the stipend of the minister in the lesser charge may be made competent and sufficient, which is hereby recommended and presented to the Commission for Plantation of Kirks, authorising them with power to that effect (a).”

Commission of
1661.

37. By the Act 1661, c. 61, for the valuation and sale of teinds and modification of stipends, the Commissioners appointed under it were empowered, *inter alia*, “to disjoyn too large and spacious kirks, build and erect new kirks, dismember, annex, and unite kirks.” Referring to the various Commissions above mentioned granted during the reign of Charles I. for these purposes, this Act expressly exempted from the operation of the rescissory statutes (1661, cc. 9, 15) all valuations, acts, decreets, and sentences led, deduced, and pronounced by any of these Commissions, excepting such decreets and sentences “given in favours of ministers for their stipends, or for dividing, uniting, annexing, or building of kirks, which shall be found to have been unjustly or exorbitantly decerned” (b).

Subsequent
Commissions in
and after 1663.

38. By the undernoted statutes, subsequently passed (c),

(a) As to the effect of the Acts rescissory after the Revolution upon these statutes, see next para.

(b) Various instances in which this power of review was exercised by the Commissioners and the decrees of

their predecessors were reduced, are given by Connell Par. p. 40 *et seq.*

(c) See 1663, c. 28; 1672, c. 15; 1685, c. 28; 1686, c. 22; 1690, c. 30; 1693, c. 23.

similar powers were conferred on the Commissioners thereby appointed to alter and readjust parish boundaries. The authority granted to them in these respects is expressed in all these statutes in substantially similar, and well-nigh in identical, terms, and (as taken from the Act 1690, c. 30) may be thus expressed—"To disjoyn too large and spacious "parishes, to cause erect and build new churches, to annex "and dismember churches, as they shall think convenient." The Commission granted by 1690, c. 30, which was to endure during their Majesties' pleasure, being unexpired in 1693, while the objects intended to be attained by it were still unaccomplished, that Commission, with all the powers conferred by it, was renewed and ratified by 1693, c. 23, which contains some new directions to the Commissioners acting under it in regard to the valuation and sale of teinds.

SECTION VII.—*Summary of Powers quoad Parochial Alterations conferred upon the Commissions from 1617–1693.*

39. The various Parliamentary Commissions above mentioned were not merely temporary in point of duration, but the powers conferred by several of them were in some respects essentially different. The extent of the authority granted to the Commissioners by the Act 1617, c. 3, was to *unite* kirks or parishes; and that their powers were construed as so limited may be inferred from the circumstance that during the subsistence of this Commission special Acts of Parliament were passed for the *erection* of the new churches and parishes of Ballintrae and Strathgeth (*a*).

40. On the other hand, the next Act, 1621, c. 5, authorised —(1) the *disunion* of parishes; and (2) the *erection* of parishes with the requisite consents. This statute, however, did not expressly empower the Commissioners to *disjoin* lands from one parish and *annex* them to another, and during

Act 1617, c. 3,
authorised the
union of
parishes.

Act 1621, c. 5,
the disunion
and erection of
parishes.

(*a*) See the Acts 1617, c. 33, and 1617, c. 35.

CHAP. I.

the subsistence of this Commission instances occur of special statutes being passed for the purpose of disjoining and annexing lands parochially. Thus, by the Act 1621, c. 80, lands are disjoined from the parishes of St. Cuthbert's and Holyrood House and annexed to the burgh churches of Edinburgh; and by that of 1621, c. 97, a disjunction is effected of a part of St. Andrews parish, which is thereupon annexed to that of Ceres.

Disjunction of
parishes under
subsequent
Commissions
1627-1693.

41. The Commission of 7th January 1627 authorised the *disjunction* of parishes which had been united, and the division of too extensive parishes. The Act 1633, c. 19, not only authorised the Commissioners to review the sentences of the former Commissions in regard to the union and disunion of parishes, but also to *divide* and *unite* parishes. The Acts 1641, c. 30; 1644, c. 24; 1647, c. 32; and 1649, c. 45, gave power to the Commissioners to *divide* parishes, to *disjoin* lands from one parish and *annex* them to another, and to *unite* parishes. By the subsequent Acts, from 1661, c. 61, to 1693, c. 23, both inclusive, powers of a substantially similar nature and extent were conferred.

SECTION VIII.—*Parochial Alterations under 1707, c. 9.*

Powers of Com-
missioners
vested in Court
of Session.

42. The powers granted by the Act 1690, c. 30, and renewed and confirmed by that of 1693, c. 23, to the Commissioners appointed under them, were, by the Act of Queen Anne, 1707, c. 9, transferred to the Lords of Council and Session, in other words, to the Court of Session, commonly called in this relation the "Commissioners" (*a*), who are thereby specially authorised, *inter alia*, "to disjoyn too large" paroches, to erect and build new churches, to annex and "dismember churches as they shall think fit, conform to the" rules laid down and the powers granted" by 1633, c. 19; 1690, cc. 23, 30; and 1693, c. 23 (*b*), in so far as unrepealed

(*a*) See *Presbytery of Stirling v. Heritors of Larbert and Dunipace*, 1900, 2 F. 562.

Anne, this Act is cited as the 24th (not 23rd) Act of the Parliament 1693.

(*b*) In the above statute of Queen

—“ the transporting of kirks, disjoyning of too large paroches, “ or erecting or building of new kirks, being always with the “ consent of the heritors of three parts of four, at least, of “ the valuation of the paroch whereof the kirk is craved to “ be transported, or the paroch to be disjoyned, and new kirks “ to be erected and built, the minister, in the meantime, to “ serve the cure in the present kirk of the paroch.”

43. None of the enactments above mentioned subsequent to 1621, c. 5, contains the proviso embraced in it, and in the prior statute, 1617, c. 3, viz., that, in the dismemberment and union of parishes, the consent of patrons, titulars, and “ all “ parties having interesse ” in the matter was to be obtained : and none of the Acts above referred to (*a*) contain any special rules as to the form of process to be observed in proceedings under them relative to the disjunction and erection of parishes. It will also be observed from the proviso above quoted, occurring in the Act 1707, c. 9, that the only consent which is thereby required is that of a certain proportion of the heritors of the parish. By the Act 1621, c. 5, however, it was declared necessary “ to sunmond all patrones, tackes- “ men, and other parties whatsoever having interesse in the “ particulars ” therein mentioned, which included the disuniting and erecting of “ kirkes ” as distinct “ parochines.” It is, therefore, not unreasonable to suppose that this equitable rule was observed by the Commissioners under the five statutes last adverted to in their proceedings connected with parochial dismemberment and erections. It may further be observed, that in the proceedings connected with the valuation and sale of teinds under the statutes 1633, c. 19, and 1690, c. 30, the citation of all parties interested therein, viz., the patron, titulars, tacksmen, and minister of the parish, is assumed, if not enjoined. Hence, the allusion to these five Acts, cited in the statute of Queen Anne in conjunction with the special proviso, contained in the statute itself, seems to

Parties called
in proceedings
under Commis-
sions.

(*a*) Viz.—1633, c. 19 ; 1690, cc. 23 and 30 ; and 1693, c. 23.

CHAP. I.

infer the citation to a process of parochial disjunction or erection of all parties having any interest in its result; whilst the statute itself requires as a condition of decree being obtained, even without opposition, the consent of the requisite proportion of the heritors of the parish.

Procedure
under 1707,
c. 9.

Case of Cadder.

44. Various examples occur down to 1764 of the erection of parishes effected under the Act 1707, c. 9. The process seems to have been ordinarily raised at the instance of the Presbytery of the bounds and the Procurator for the Church by themselves, or along with the minister of the parish, according to circumstances (*a*). In the case of the erection of the parish of Cadder (*b*) in 1743, the heritors of the parish in a body were the pursuers. The College of Glasgow *qua* titulars were called as defenders, and resisted the erection on various grounds. A proof was allowed, on considering which the Court declined to authorise the erection. According to Connell, this is the only instance in which a proposed parochial erection was refused where the requisite consents of the heritors had been obtained.

Consent not
required to a
union of
parishes.

45. Under the authority conferred by 1707, c. 9, to *annex* "churches," the Commissioners of Teinds have exercised the power under this Act of *uniting* parishes. As has been already observed, the proviso in regard to consent on the part of the heritors does not *in terminis* apply to such a parochial transformation: and, as was decided in the case of Kirknewton in 1750 (*c*), such consent is not there required. This was a process at the instance of the patron and heritors of the parish for uniting it with the parish of East Calder. The heritors of the latter parish opposed the union on various grounds, and, *inter alia*, pleaded that by the Act 1707, c. 9, the consent of three-fourths in value of the heritors was required for the *transporting* of churches. The

(*a*) See cases cited by Connell Par. pp. 63, 66, 69, 72, 74.

(*b*) Heritors of Cadder *v.* College of Glasgow, 1743, *ibid.* p. 78.

(*c*) Heritors of Kirknewton *v.* Heritors of East Calder, *ibid.* p. 161. This case is referred to in Elliot *v.* Minister of Abbotrule, 1777, M. *Stipend*, Appx. 1.

Court, however, found that no such consent was necessary "to the erecting of a new kirk in the case of an annexation," that is, as in the case in question, on the *union* of parishes (*a*).

46. The motives which chiefly prompted the Legislature to confer on the Parliamentary Commissioners under the earlier statutes referred to the power of parochial alteration, were, on the one hand, to secure competent stipends to the reformed clergy, and on the other to supply the inhabitants throughout the country with places of public worship to which they could conveniently resort. None of these statutes, however, define the distinctive legal results which the particular parochial change effected. Their provisions are meagre and somewhat obscurely worded, and do not discriminate between parochial alterations *quoad omnia* and *quoad sacra* merely (*b*). This important practical distinction seems also to have been to a considerable extent overlooked in the decrees and sentences of the Parliamentary Commissioners, many of which are so expressed as to leave it doubtful what the precise character of the parochial alteration effected really was. Motives for parochial alterations.

Vagueness of the early Act.

47. It has been stated that until the Act 7 and 8 Vict. c. 44, "there was no such thing known in the law of Scotland as the disjunction and erection of parishes *quoad sacra*," and that there were no different kinds of *such* decrees, but one kind only (*c*). This statement is too broad. In towns there were undoubtedly parochial divisions *quoad sacra*. The City Parish of Glasgow, for example, was divided into nine parishes *quoad sacra* by a decree of the Court of Teinds in 1818, and into ten in 1820. The Laigh Church of Kilmarnock was erected into a church and parish *quoad sacra* in 1811 (*d*). Not only Erections *quoad sacra* before 1844,

(*a*) Such is the import of this decision as understood by Erskine, i. 5, 21.

(*b*) A similar remark is applicable even to special statutes passed for annexing or disjoining particular lands or parishes. See, for example, the Act 1621, c. 80, disjoining lands from St. Cuthbert's, and annexing them to the burgh of Edinburgh.

(*c*) Per Lord President Inglis (then Lord Justice-Clerk) in *Marquis of Bute v. Magistrates of Rothesay*, 1864, 2 M.P. at p. 1282.

(*d*) See *Magistrates of Kilmarnock v. Aitken*, 1849, 11 D. 1089, and Session papers therein.

CHAP. I.

prior to the Act of 1844, but also to that of 1707, annexations of land *quoad sacra* were made, both by the permanent and by the Parliamentary Commissioners. In several instances, prior to 1707, decrees were pronounced which, from the reservation of civil rights and interests which they contain, were truly and in legal effect nothing else than decrees of disjunction and annexation *quoad sacra* (a). In one reported case, at all events, the decree bore this character expressly; while between 1707 and 1844 various, if not numerous, decrees *quoad sacra*, as opposed to *quoad omnia*, were pronounced, which were recognised and given effect to as such.

Annexations
quoad sacra
prior to 1707,

48. The distinction in question not merely forms the ground of judgment in the cases of Carmunnock (b) and Monzie (c), but also of express declaration in the decrees of annexation there pronounced, and of a similar decree in the case of Falkirk (d). The distinction alluded to is explained by Forbes (e), whose Treatise on Tithes was published in 1705, who explicitly says that lands were often disjoined from one parish and annexed *quoad sacra tantum* to another; and by Bankton (f) and Erskine (g), both of whom explain and contrast the law as applicable to the parochial dismemberments *quoad sacra* and *quoad omnia*.

Annexations
quoad sacra
subsequent to
1707.

49. Subsequently to 1707 the permanent Teind Commissioners continued to disjoin lands and annex them *quoad sacra* to a different parish, a practice which, though indeed it has been said (h) that it "seems to have grown up without

(a) See *Williamson v. Ramsay*, 1685, M. 5121 and 5122, "*Queritur*"; also terms of decree of union of Bassendean in 1618; and decrees of disjunction and annexation of Ravelston in 1630, and of Tough in 1668; Connell Par. p. 19, 32, and 47. See also the remarks of this author at p. 60, read in connection with those at p. 33.

(b) *Park v. Maxwell*, 1748, M. 8503. The date of the decree of annexation *quoad sacra* in this case was 24th Nov. 1725. See Connell Par. p. 222.

(c) *Drummond v. Heritors of Monzie*, 1773, M. 7920. The date of the decree

in this case was 22d July 1702. See Session papers, Campbell's Coll., vol. 22, No. 60.

(d) The decree of annexation in this case was pronounced on 18th Nov. 1724. See Connell Par. p. 219.

(e) Forbes' Tithes, p. 416.

(f) Bank. Inst. 2, 8, 50.

(g) Ersk. Inst. 2, 10, 64, and Pr. 1, 5, 19.

(h) Per Lord President Inglis (then Lord Justice-Clerk) in *Marquis of Bute v. Magistrates of Rothesay*, *supra*, 2 M'P. p. 1282.

“direct authority,” appears within the scope of the Commission and in consonance with the practice of all previous Commissions. On this point it may be remarked that the power conferred on the Parliamentary Commissioners by the various statutes to make parochial alterations was expressed in general terms, and did no more authorise them to erect, unite, or annex lands *quoad sacra et civilia* than *quoad sacra tantum*. They had no greater or less power to affect the one parochial alteration than the other, being possessed apparently of equal power to do either (a).

50. In virtue of the Act 1707, c. 9, the Court of Session (not strictly the Judges as a body of Commissioners (b)) was invested with the powers formerly conferred on the successive Parliamentary Commissioners of uniting and erecting parishes, and of disjoining and annexing lands, both *quoad omnia* and *quoad sacra*. All these powers have, since the Union, been exercised by the Court of Session, and are still possessed by it. In consequence, however, of the Act 7 and 8 Vict. c. 44, most of the parochial alterations above mentioned are now carried through under its provisions, which are much more precise, and in general more ample, than those in the Act of Queen Anne (c). Before examining the leading provisions of the statute, it will be convenient here to allude to the nature and effect of parochial unions, erections, and annexations generally.

SECTION IX.—*Import of Parochial Alterations Quoad Omnia and Quoad Sacra.*

51. The leading distinction which exists in the parochial alteration of land arises from the character of such alteration, according as it is intended or calculated to affect the interests, rights, and obligations of their inhabitants *quoad omnia* or

Leading distinctions between these alterations.

(a) Baird, 1893, 20 R. 973.

(b) *Presbytery of Stirling v. Heritors of Larbert and Dunipace*, 1900, 2 F. 562.

(c) The only exception to this being

that the 7 and 8 Vict. c. 44, does not appear distinctively to authorise the annexation of lands *quoad sacra*, as in contrast to their erection into a separate parish *quoad sacra*.

CHAP. I.

quoad sacra merely. The next distinction is that suggested by the extent of the alteration, according as it implies a union of two existing parishes, an erection of a new parish, or the disjunction of lands from one parish and their annexation to another.

Matters of civil and ecclesiastical concern involved in parochial alterations.

52. These several parochial alterations, according as they are *quoad omnia* or *quoad sacra*, affect questions or interests of civil concern on the one hand, and of spiritual or ecclesiastical concern on the other, in or connected with the parishes to which these alterations apply (*a*). Within such questions of civil concern are embraced those relating to minister's stipend, the erection and maintenance of parochial buildings, including churches, manses, the providing of glebes and of burial-grounds, besides education, poor relief, and other parochial burdens with which the present treatise does not profess to deal. The matters of ecclesiastical concern to which the qualification *quoad sacra* applies, embrace attendance at the services of public worship in the parish church, and the performance by the minister, towards his parishioners, of the offices of religion generally.

Grounds for a union of parishes.

53. In the Act 1617, c. 3, conferring special powers on the Commissioners to unite "kirks" or parishes, the ground or reason for so doing is stated to be the insufficiency of the fruits or teinds of either of the parishes singly to support a minister. While this has continued to be an important element in questions of parochial union, various cases have occurred under the Act 1707, c. 9, which suggest the remark that other circumstances have come to be regarded as of essential importance in all such processes, among which may be especially mentioned the population and territorial extent of the parishes proposed to be united, and their contiguity or proximity in point of relative situation (*b*).

Reasons for or against union.

54. When the condition of the parishes in these respects

(*a*) See Bank. Inst. ii. 8, 50; Ersk. Inst. ii. 10, 64; and Prin. i. 5, 19.

(*b*) A remark to this effect is made

by Connell, and seems amply corroborated by the various cases mentioned by him.—Par. pp. 150-213.

is such as to imply that, if united and merged in one parish, one clergyman of average ability and industry could conveniently and efficiently discharge the duties of the pastoral office in connection with both districts, then a *prima facie* case exists for their union parochially, to which the Court will be inclined to give effect, unless other substantial or counterbalancing reasons exist against the proposed change. Such reasons may be various in their nature and degree of relevancy; but they very frequently consist of, or are connected with, the imposition of an additional burden on the heritors of one or both of the districts in connection with the erection of new parochial buildings; or the alleged inconvenient distance of the proposed parish church *quoad* a certain number of the inhabitants of one or both of the districts proposed to be united.

55. The parties principally interested in the union of parishes are—(1) the General Assembly, (2) the Synod, (3) the Presbytery, (4) the titulars and others in right of the teinds, (5) the ministers, (6) the heritors, and (7) the inhabitants generally of the respective parties. As charged with the duty of protecting and advancing the interests of the National Church, and the spiritual welfare of its members, the General Assembly seems entitled to interfere in the union of parishes, either in the way of countenancing or opposing such a measure, according as the religious well-being of the district is likely to be thereby affected. Instances occur in which this reverend body has appeared by the Procurator for the Church to oppose the union of particular parishes, but not always with success (*a*).

Parties interested in a union of parishes.

General Assembly.

56. The nature of the Presbytery's interest is also mainly of an ecclesiastical character. It arises naturally from the position and functions held and exercised by this body as

Presbytery.

(*a*) Thus, on the union of the parishes of Kinnaird and Farnwell in 1772, the Procurator for the Church, on behalf of the General Assembly, opposed the union on the alleged

ground of its being detrimental to the interests of religion, but his opposition was unsuccessful. — See Connell Par. p. 183.

CHAP. I.

guardians, not only of the spiritual interests of the parishes within its bounds, but also of the Church establishment generally, including property connected therewith, as churches, glebes, and manses. While in many instances of parochial unions under the Act 1707, c. 9, the Presbytery's consent has been given, such consent is not required by statute or otherwise (*a*); and cases have occurred where, notwithstanding opposition by the Presbytery, the Court have pronounced a decree of union (*b*). The nature and extent of the respective interests of the other parties now mentioned, in the union of particular parishes, will be inferentially explained in the following section, which relates to the effect of the union of parishes on their civil rights and obligations.

SECTION X.—*Nature and Effect of the Union of Parishes.*

Extinction of
former parishes
on their union.

57. The decree of the Teind Court uniting two parishes terminates their former separate existence. Sometimes the decree contains a special clause to this effect, suppressing as from its date, or from some future specified time, the parishes as independently existing. Whether formally declared or not, however, the result of their union is to blend into one parish the lands of both or all of them, either under a new name, or under a name of mere extensive territorial application. Besides having an important bearing on the spiritual interests of the community, such a proceeding must, it is apparent, directly affect all, and to a considerable extent alter or modify many, of the parochial ecclesiastical rights and obligations *quoad civilia*, which formerly subsisted.

Effect of union
on liability for
stipend.

58. As the minister's stipend is a burden upon teinds, in whose hands soever the same may be, and as the order of

(*a*) This was substantially decided in the case of Whitsome and Hilltown in 1734, and admitted by the Presbytery of Brechin in the case of Kinnaird and Farnwell, just men-

tioned.—See Connell Par. pp. 157-9, and 181.

(*b*) As in the case of Mains and Strathmartin in 1792, and in that of Broughton and other parishes in 1794.—*Ibid.* pp. 193 and 200.

liability for such stipend, known as the localling of the stipend, is dependent upon the nature of the respective rights of those who possess or intromit with the teinds, titulars, tacksmen of teinds, and the proprietors of land generally within the parishes proposed to be united, are or may be materially affected by the measure. Differing in this respect from the erection of a new parish and benefice, the union of two or more parishes, which involves to a greater or less extent the suppression of one or more previously existing independent benefices, does not usually operate to increase the *cumulo* amount of stipend due from the teinds of the lands thus parochially united. On the contrary, its tendency is rather in an opposite direction, either immediately or ultimately.

59. The case is different in regard to the localling of the minister's stipend after the union of parishes. These are now one parish. Hence all the possessors of or intromitters with teinds, throughout its entire extent, are liable to be localled on for stipend according to their respective rights *inter se*. This may involve some, and possibly very great, changes in the extent of individual liability for stipend, as compared with that which formerly existed,—certain heritors being subjected in payment of a much larger portion thereof, under the scheme of locality for the united parish, than that exigible from them out of the teinds of their former parishes respectively (*a*).

Individual liability directly affected.

60. The blending of two or more parishes into one has an important bearing on the interests of the incumbent. In the first place, such a parochial alteration theoretically involves the suppression of one pastoral charge as a separate cure. Hence, the most reasonable and convenient time, in many respects, for effecting a union of two parishes is on the occasion of a vacancy occurring in one of them. Various examples, however, occur in which a union of parishes has been declared

Effect of union *quoad* the minister.

Conditional union.

(*a*) It is not within the scope of this treatise to pursue the above subject further; but the reader who desires to do so, may consult Connell, *Tithes*, vol. 1, p. 510.

CHAP. I.

while the cure of both was full. In such cases it is usual to insert in the decree a provision to the effect that the union is not to become operative until the death, transportation, or demission of the minister of one of the parishes; or that both incumbents are to continue to enjoy their existing stipends until one or other of these events occurs (*a*).

Effect of union
quoad stipend
and tempo-
ralities.

61. From the date when the decree of union takes full effect, the minister, *quo* parochial incumbent, becomes entitled to the stipend then payable out of the teinds of the whole parish, which, in the ordinary case, will include both of the stipends formerly payable, with such additional amount, if any, as may be modified in the decree. In virtue of the union, he likewise frequently obtains an increase to the temporality of his benefice by the acquisition of the glebe or grass lands, or part thereof, which were formerly attached to the now extinct cure (*b*).

Quoad
heritors.

62. The union of parishes generally operates to relieve, to a certain extent, the heritors as a body of some portion of the parochial burdens which would otherwise have existed. One church and one manse now, in many cases, suffice for the community. Hence, when, prior to the union, each of the parishes was provided with a separate set of these buildings, the future expense connected with the maintenance of proper accommodation for the minister and the church-going population will be proportionally diminished. It frequently occurs, however, that, owing either to the insufficient state of repair or size of these buildings, as pertaining to each parish before the union, they, or some of them, do not suit the requirements of the united parish. If this be so, then either an entirely or a partially new set of parochial buildings requires to be provided. This, of course, involves the

(*a*) See cases of the union of the parishes of Dipple and Essill in 1731, Whitsome and Hilltown in 1734, Killerny in 1740, and Kinkell and Keithhall in 1754, all mentioned by Connell Par. pp. 156, 157, and 169.

(*b*) Instances to this effect occur in *Forbes v. Miller*, 1755, M. 5127, and *Minister v. Heritors of Little Dunkeld*, 1791, M. 5153. See also the case of Lethnot and Novar in 1723, Connell Par. 153.

heritors, in the meantime, in some amount of present expenditure, and forms a not unusual ground of objection on the part of the heritors of either or both of the parishes against their union.

63. When a new church for the united parish had to be built the materials of the old church or churches were sometimes ordained to be used, so far as serviceable, in its erection; or sometimes they were ordered to be sold by public roup or private bargain, and the price obtained applied in diminishing *pro tanto* the cost of the new building, the assessment for which was ordinarily laid on the whole body of heritors according to the rule of the valued rent of their lands. A somewhat similar course was usually followed in regard to the disposal and application of the old manse or manses, or the price thereof, when a new manse was to be provided. The site of the new church was generally selected with a view to the convenience of the general body of the parishioners, and that of the new manse was usually ordained to be in as close proximity to the church as conveniently might be.

Building
church and
manse for
united parish.

64. Sometimes on a union of parishes a new glebe was assigned to the minister. In such a case it was usually provided, either that the old glebes were to be sold, and their price applied in purchasing the requisite or a corresponding quantity of ground adjacent to the manse, or that they were to be conveyed to the heritors out of whose lands the new glebe was designed.

New glebe,
how provided.

65. Unless from defectiveness of accommodation in the existing burial-grounds, or from some other weighty reason, the Court does not seem to have countenanced the disuse of the old churchyards by ordering the designation of a new churchyard; and the decree of union not unfrequently contained an express order on the heritors to repair, if defective, the dykes of the existing burial-grounds with a view to their maintenance in a becoming condition.

Churchyards.

CHAP. I.

Conditions
inserted in
decree.

66. The extent to and manner in which these and similar changes in the existing state of the parochial buildings and equipment were to be effected, were frequently prescribed in the decree of union, or in the judicial proceedings connected with it. These changes involved, to a greater or less extent, expense to the body of heritors, and consequently gave them a direct practical interest in the proposed union (*a*).

Effect of union
quoad church
accommoda-
tion for
inhabitants.

67. Besides the ecclesiastical change consequent on a union of parishes, whereby the inhabitants of two or more districts are henceforth to form one cure of souls, and to be subject to the spiritual superintendence of a single clergyman, this measure personally affects them, inasmuch as it entails in all cases *quoad* some of them, and in some cases *quoad* all of them, a change in their parish church, one building now sufficing for the accommodation of the entire parochial community. If one of the two existing buildings be suitable for this purpose, then it will be ordained to form the parish church, and the other will be suppressed,—the effect being to deprive the latter building of its character as the parish church, and to extinguish the rights and obligations connected with it as such. If from defective size, extensive disrepair, or otherwise, neither building is, or can, by a judicious expenditure, be made suitable as a place of worship, then a new church will be ordained to be erected, and, if possible, in a situation convenient for the bulk of the parishioners. The former church being suppressed, the new building will, on completion, become, and thereafter remain, the parish church, *i.e.*, the place of public worship to which the community are to resort, and in which the services of religion are to be regularly performed, and the sacraments administered by the parish minister.

(*a*) In illustration of the remarks made in paragraphs 62-66, the following cases of union of parishes are referred to, *viz.*, Kinnore, 1725; Kirkbride, 1727; Kirknewton, 1750; Liff,

1753; Swinton, 1761; Forbes, 1792; Mains, 1792; and Broughton, 1795.—See Connell Par. pp. 154, 155, 161, 168, 177, 192, 193, and 200.

SECTION XI.—*Nature and Effect of Parochial Disjunction and Erection.*CHAP. I.

68. This process involves either the separation, into two or more districts, of what was formerly one parish, and the erection of these dismembered districts into an independent parish, or the severance or dismemberment of lands from one or more parishes, and the erection of these lands into an independent parish. The creation of new parishes out of lands already parochially assigned, or, in other words, the multiplication of parishes, was originally suggested by, and due mainly to, excessive territorial extent. A parish may be deemed too extensive when, in consequence of its size, regular attendance at the church is impracticable or seriously inconvenient to any considerable number of the parishioners, or when the due discharge by the incumbent of his pastoral duties toward them, including the duty of visitation, is prevented or seriously interfered with. By a recent statute, however, extent of population, as well as of territory, justifies the disjunction of lands and their erection into a new parish (*a*).

What involved
in parochial
erectiōns.

69. The effect of disjunction and erection is, on the one hand, to dissolve the parochial connection formerly subsisting between the disjoined lands and the parish or parishes to which they formerly belonged, or to suppress their former parochial constitution; and, on the other hand, to incorporate and erect the disjoined lands into an independent parish, with all the legal consequences thence resulting. These include, *inter alia*, the creation of a new cure of souls and the maintenance of a new benefice attached thereto, and the payment of parochial burdens imposed in respect of residence, or of proprietorship of lands within the new parish. While the effect of a parochial disjunction and erection usually is to terminate the heritors' liability to pay stipend to the minister

Effect of new
erection.(*a*) See 7 and 8 Vict. c. 44, s. 2.

CHAP. I.

of the old parish, this result does not follow in cases where (as sometimes occurs) the decree bears that such stipend is in part to be paid out of the teinds of the disjoined lands. In these instances this provision is assumed to be a condition of the transaction, and will be given effect to accordingly; and it may be so conceived as to entitle the incumbent of the new parish to derive stipend from the teinds of his parish, only after or in so far as the amount of stipend localled on them under the decree of modification in favour of the minister of the old parish permits (*a*).

Parties interested in parochial erections.

70. As the creation of a new cure of souls, which involves the suppression, to a partial extent, of an existing one, directly affects the spiritual interests of the parishioners, and the extent of the labours of the existing pastoral charge, the General Assembly, the Synod, and the Presbytery of the bounds, *qua* guardians of the religious welfare of the community, as well as the incumbent whose pastoral charge is to be curtailed, seem to be to a greater or less extent interested in the proposed parochial change. In connection with the obligations of providing the incumbent of the new cure with a sufficient benefice, the titulars and tacksmen of teinds and the heritors are likewise directly interested in the measure in a secular and pecuniary point of view.

Civil results more important on erection than on union of parishes.

71. While the union of parishes — which, as already remarked, assumes the suppression of one cure of souls — probably implies a more important ecclesiastical change than the erection of a new parish, which does not necessarily involve such a result, this latter measure, involving as it does the creation of a new cure, and consequently a new benefice, is fraught with much more important and extensive civil results; inasmuch as, instead of diminishing parochial burdens, it directly operates to create or increase them.

Parties to be called.

72. These considerations suggest the propriety of making

(*a*) See Common Agent in Locality of Abbotshall *v.* Martin, 22nd Nov. 1815, F.C.; Pennel *v.* Malcolm, 1869, 7 M.P. 1078; Simpson *v.* Ewing, 1882, 10 R. 313; and *post*, CHAPTER VII.

titulars, tacksmen of teinds, and heritors parties to any action brought to disjoin lands from one and erect them into an independent parish. Failure to call certain heritors of a parish as defenders to such an action seems to have been one principal ground on which the House of Lords proceeded in setting aside a decree of erection pronounced by the Court of Teinds in the case of St Ninians (*a*).

SECTION XII.—*Nature and Effect of Parochial Disjunction and Annexation of Lands.*

73. This measure involves, on the one hand, the severance from one or more parishes of lands parochially attached to, Changes implied in an annexation. and forming part of, the parish or parishes; and, on the other hand, the parochial incorporation of these lands with a different parish or different parishes, of which thereafter they form an integral part. In this process the creation of a new cure is not implied. The principal changes which it involves are (1) the transference from one pastoral charge to that of another of the inhabitants of the lands disjoined; and (2) the transference from one parish to another of the exercise of certain civil rights enjoyed, or of liability for certain civil obligations imposed, in connection with the dismembered lands.

74. While neither in its ecclesiastical nor civil aspect does the disjunction and annexation of lands operate so important Parochial burdens, how affected. a parochial change as a disjunction and erection does, the former measure, unlike that of the union of parishes, is not directly calculated to diminish, and does not generally diminish, the parochial burdens on the heritors. These usually remain much the same in kind as before, affected only in amount according to the extent of the parochial burdens in the parish to which the lands are annexed, and the area over which the relative assessment is spread. The

(*a*) *Kilsyth v. Presbytery of Stirling*, as reversed 1713, Robertson, 65, not reported in Court of Session.

CHAP. I.

dismemberment of these lands, however, will almost certainly to some extent affect, and may considerably increase, the parochial burdens effeiring to the proprietors of the remaining portion of the original parish. The ordinary result of a disjunction and annexation is to relieve the owners of the disjoined lands from the parochial burdens formerly imposed on them as members of the original parish, and to subject them to the parochial burdens of the new parish. As a general rule, express provision to a contrary effect in the decree of annexation will be necessary to avoid or modify this result (*a*).

Parties interested in annexations.

75. The measure in question involves, *quoad* the lands disjoined and the parish to which they are annexed, a transference both of the ecclesiastical and civil rights and obligations of the incumbent and of the community. Hence the Church courts above mentioned (*b*), and the clergymen of the disjoined lands and the enlarged parish, on the one hand, and the titulars, tacksmen of teinds, and heritors of such lands and parish on the other hand, are or may be affected, to a greater or less extent, by the parochial change. Being so, they are interested either to promote or to oppose it.

Annexations presumed to be *quoad omnia*.

76. The tendency of judicial decision is to treat disjunctions and annexations as of a *quoad omnia* character, unless it clearly appear that they are *quoad sacra* merely (*c*). The decree will not be held to be *quoad sacra tantum*, although it bear that the interest of the minister of the dismembered parish—*i.e.*, for his stipend out of the teinds of the disjoined lands—is reserved. Indeed, the *dicta* in the case of *Baltingry* (*d*) almost imply that the actual use of the phrase *quoad sacra* in the decree is required in order so to limit its effect.

(*a*) *Burns v. Ewing*, 1837, 15 S. 936, reversed, M'L. & R. 435; *Marquis of Bute v. Magistrates of Rothesay*, 1864, 2 M'P. 1278; *Reid v. Commissioners of Woods*, 1850, 12 D. 1211.

(*b*) *Ante*, p. 38, para. 70.

(*c*) *Johnston v. Heritors of St. Cuthbert's*, 1802, M. 14834; *Pennel v. Malcolm*, 1869, 7 M'P. 1078; Cases in note (*a*), *supra*.

(*d*) Per Lord President Inglis and Lord Kinloch in case last cited.

77. Although the annexation of lands to a new parish is not, in the ordinary case, calculated much to affect the parochial burdens of the heritors, either of the lands disjoined or of the parish to which they are annexed, the disjunction directly tends—by narrowing the area for parochial assessment within the dismembered parish—to increase the extent of the individual liability of its heritors. Accordingly the Act 1707, c. 9, seems to require, in the disjunction and annexation of lands, that the consent of three-fourths in value of the heritors of the parish so dismembered be obtained. This, which seems the reasonable and just interpretation of the Act, was that given effect to in the case of Carmunnock (*a*) in 1725, which, although an instance of the disjunction and annexation of lands *quoad sacra*, is not on that account the less an authority on this point.

Is consent of heritors required thereto?

SECTION XIII.—*Effect of a Disjunction and Annexation Quoad Sacra.*

78. The effect of a disjunction and annexation of lands *quoad sacra*, under the Act 1707, c. 9, and prior statutes, implies a curtailment of the pastoral charge of the parish from which the lands are disjoined, and a corresponding enlargement of that of the parish to which they are annexed. It does not seem, however (unless when otherwise declared in the decree), to involve an alteration in the civil rights and obligations of the inhabitants of the annexed lands, save in so far as regards the right to church accommodation on the one hand, and liability to church assessment on the other.

What implied in an annexation *quoad sacra*.

79. In the case of Carmunnock (*b*), it was held that the heritor of the disjoined lands was not liable for the cost of repairs on the *manse* of the parish to which they were annexed *quoad sacra*. On the other hand, in the case of Monzie. Monzie (*c*), it was decided that the heritor of the disjoined

Case of Carmunnock.

(*a*) Connell Par. p. 220.

(*c*) Drummond v. Heritors of Monzie,

(*b*) Park v. Maxwell, 1748, M. 1773, M. 7920.

CHAP. I.

lands was liable in the burden of upholding the *church* of the parish to which they were so annexed, but in no other parochial burden, but this case, it has been judicially stated, proceeded upon specialties (*a*). The doctrine expressed by Bankton (*b*), and substantially adopted by Erskine (*c*), is in conformity with what is now understood to be the law, viz., that in *all* questions of civil concern the district disjoined and annexed *quoad sacra* “remains still a part of the original “parish,” and that “the heritors therein are not bound to contribute to the repairs of the *church* or manse of the parish “to which the lands” are annexed.

Rights and obligations consequent on annexation *quoad sacra*.

80. Both these writers agree in saying that a disjunction and annexation *quoad sacra* has the effect of subjecting the inhabitants of the annexed lands to the care and charge of the minister of the new parish, and confers on them the rights and privileges consequent on such a change. These seem to embrace not merely the right to attend the services conducted, and to partake of the sacraments administered at the church of the parish to which the lands are annexed, with the corresponding duty or obligation to resort thither for these purposes, but likewise the right to claim the benefit of the pastoral services of its incumbent. The right and duty to attend the church of the new parish implies the right of accommodation within it, which right, equally with the obligation to uphold the building, is a matter of civil concern.

(*a*) Per Lord Deas in *Roxburgh v. Miller*, 1876, 3 R. 728, reversed 1877, 4 R. (H.L.) 76.

(*b*) Bank. ii. 8, 50.

(*c*) Ersk. Inst. ii. 10, 64, and Prin. i. 5, 19. The case of *Park v. Maxwell*, *supra*, which is referred to by both these authors in support apparently of the doctrine of law stated by them in the passages cited, did not decide any question as to liability for the repairs of a *church*; but exclusively the point that the heritors of lands annexed *quoad sacra* were not liable in contributing to repair

the *manse* of the parish to which their lands were so annexed. This appears not only from the reports of the case in the Folio Dictionary and in Morison (8503), but also from the pleadings in the Session papers, Fac. Coll. vol. iv. No. 274. The subsequent case of *Drummond* in 1773 did not occur till above twenty years after the publication of Bankton's work. This case is not mentioned by Erskine, and seems at variance with the doctrine of law stated by him to have been adjudged in *Park v. Maxwell*.

81. Hence this right and this obligation form the exceptions to the general doctrine, that in matters of civil concern lands disjoined and annexed *quoad sacra* still remain a part of the original parish (*a*). Consistently with this doctrine, such an annexation does not, as a general rule, affect the claim for stipend competent to the minister either of the parish from which the annexed lands are disjoined, or of that to which they are united (*b*). Neither does it alter the previously subsisting obligations of the inhabitants of these parishes in regard to the support of their respective poor, or the rights and duties of the authorities of each parish in the matter of providing for their relief (*c*).

Does not affect civil rights or obligations.

SECTION XIV.—*Parochial Alterations now competent to the Teind Court.*

82. As the 7 and 8 Vict. c. 44, does not repeal or abridge the powers conferred by the Act 1707, c. 9, in the matter of parochial alterations, the Judges of the two Divisions of the Court of Session, with the Lord Ordinary on Teinds, or a quorum of them, under 2 and 3 Vict. c. 36, section 8, and 31 and 32 Vict. c. 100, section 9, are, *qua* Teind Commissioners, authorised by the Acts 1707, c. 9, 7 and 8 Vict. c. 44, and 31 Vict. c. 30, to effect the following parochial alterations, viz.—

- (1) To unite parishes ; (2) To disjoin and erect parishes ;
- (3) To disjoin and annex lands to other parishes ; (4) To disjoin and erect districts *quoad sacra* ; (5) To erect Gaelic churches and congregations into parishes *sine territorio* ; (6) To disjoin and erect into parishes *quoad sacra* districts attached to additional churches under 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90 ; (7) To disjoin and erect into parishes

(*a*) Per Lord Curriehill in Magistrates of Fortrose v. Maclellan, 1880, 8 R. 124.

(*b*) Knox v. Hunter, 1772, M. 14,802 ; Bank. ii. 8, 50 ; Ersk. Inst. ii. 10, 64.

(*c*) See Thomson v. Pollock, 17th Nov. 1808, F.C., and the case of Gam-mell, 26th Nov. 1816, not reported. See Dunlop Par. 3rd ed. p. 447.

CHAP. I.

Union and
annexation of
lands effected
under 1707,
c. 9.

quoad omnia districts under 5 Geo. IV. c. 90; and (8) To disjoin and erect districts *quoad sacra* out of united parishes.

83. The power to unite parishes, as well as to disjoin and annex lands to other parishes, is possessed by the Court of Session sitting as the Teind Court, in virtue of the authority conferred on them by the Act 1707, c. 9, to "annex " churches"—under which phrase parishes are held to be included—and "to disjoin too large parishes." No special mention is made of these parochial alterations in the 7 and 8 Vict. c. 44. Hence, should occasion arise for effecting either of them, the measure would probably be accomplished under the authority and in terms of the conditions contained in the Act 1707, c. 9. It has been found that it is competent under this Act to disjoin lands and to annex them *quoad sacra* to a parish *quoad sacra* (a).

Parochial
alterations
specified both
in 1707, c. 9,
and 7 and 8
Vict. c. 44.

84. The only one of the various parochial transformations above mentioned which is distinctively mentioned in both statutes is that of the disjunction and erection of parishes,—neither the union of parishes nor the disjunction and annexation of lands to another parish being specified in the 7 and 8 Vict. c. 44. The distinction between these several operations in their nature and effects having been already pointed out, the reader's attention will now be called shortly to the different parochial transformations authorised by the 7 and 8 Vict. c. 44 and the 31 Vict. c. 30, in the order above stated, commencing with the—

SECTION XV.—*Disjunction and Erection of Parishes Quoad Omnia under 7 and 8 Vict. c. 44, sections 1-7.*

Excessive
population
or extent
grounds for
dividing
parishes.

85. A parish may be disjoined or divided, and erected into a separate parish under the provisions of the Act 1707, c. 9, as altered and amended by the 7 and 8 Vict. c. 44, by reason of largeness of population, as well as of excessive territorial extent. Neither of these expressions is defined by the

(a) Baird, 1893, 20 R. 973.

statute; but, as deducible from its general intendment, the provisions contained in it, and the scope of the usual averments in proceedings taken under it, a parish may be said to be over-populous, so as to justify its disjunction, when, from the number of its inhabitants, the incumbent or incumbents of the parish cannot, though labouring with due industry and zeal, efficiently discharge his or their pastoral duties toward all the parishioners. A parish may be said to be of excessive territorial extent when from this cause a similar result follows, or a considerable number of the parishioners are thereby prevented from regular attendance throughout the year, or even during a considerable portion of it, at the parish church.

86. While, as already observed, the consent required to parochial disjunctions and erections, under the Act 1707, c. 9, was that of three-fourth parts at least of the valuation of the parish to be disjoined, the minimum amount of consent now required to such a measure has, by the 7 and 8 Vict. c. 44, section 1, been reduced to that of the heritors of the major part of the valuation of the parish.

Minimum consent required by 7 and 8 Vict. c. 44.

87. The exception to this general rule occurs in the case where there already exists, in the district proposed to be erected into a new parish, a church in good repair, sufficient in point of accommodation for its inhabitants, and suitable to be appropriated as a place of worship for their use; and the titulars, or others in right of the teinds, whereof not less than three-fourths of the additional stipend is to be modified on the erection of the parish, have either actually or constructively consented to the measure. In this case the Court may, without the statutory amount of consent, disjoin and erect the district into a parish, if it appear to them that there are good and sufficient reasons for so doing.

Exceptions to rule.

88. From the course adopted in *Campbell v. Officers of State* (a), it might appear that the Court did not consider the

Campbell v. Officers of State.

(a) 1864, 3 M'P. 295.

CHAP. I.

concurrence of both the above conditions necessary, but, on the contrary, the presence of the former alone sufficient to supersede the statutory amount of consent on the part of the heritors. This suggestion, however, is untenable, for the statute is explicit. It is true that the defenders, on behalf of the Crown, which was patron and titular of the parish, lodged defences to and opposed the action, and that, nevertheless, the action was ultimately disposed of on its merits and dismissed; but the Crown, though it opposed the action upon certain grounds, did not *qua* titular dissent upon discretionary grounds.

Form of process under 1707, c. 9.

89. The particular form of process to be brought for the purpose of effecting disjunctions and erections *quoad omnia* is not specified in the 7 and 8 Vict. c. 44. Under the previous Act of 1707, c. 9, and earlier statutes, the kind of action usually adopted in such disjunctions and erections was by way of summons. No alteration in this respect has been introduced by the Act of Victoria; and the parochial alterations in question are carried through under a similar form of process. Actions of this description have been instituted by the moderator of the Presbytery of the bounds (*a*), by the minister of the parish (*b*), by the Presbytery of the bounds and the Procurator for the Church (*c*), by these parties along with the minister of the parish (*d*), by the heritors of the parish (*e*), and by the patron (*f*). The parties who have been called as defenders in different cases include, in addition to those just mentioned, the titular or titulars of the parish.

Parties to be called.

90. It has been said that all the interests required to be represented in an action of disjunction and erection *quoad*

(*a*) Sauchenford, 1698; (*b*) Meathie, 1667; for both of which see Connell Par. pp. 55, 57.

(*c*) Yell and Fetlar, 1709; Island of Lewis, 1722; Polmont, 1724; and Skye, 1726; (*d*) Durness, 1724; (*e*) Calder, 1743; for all which see

Connell Par. pp. 63, 66, 72, 75, 69, and 78.

(*f*) Summons at instance of Marquis of Bute *v.* Heritors of Rothesay in 1844, mentioned in Marquis of Bute *v.* Magistrates of Rothesay, 1864, 2 M'P. 1278.

omnia are “represented by the patron, titular, the minister and kirk-session, and the Presbytery being called as defenders” (a), but it is certainly expedient in all cases to call the heritors. Subject to this remark, the parties to be called in such actions appear to include those (not being themselves pursuers) whose civil rights or obligations will, or may, be directly affected by the measure itself: also the Presbytery of the bounds, and the minister and kirk-session, as well of the parish to be dismembered, as (where such exists) of the chapel of the district to be erected—they being the parties who are chiefly interested in the protection and promotion of the spiritual interests of the locality.

91. It has been stated that to render competent a process of disjunction and erection *quoad omnia* under the Act 1707, c. 9, the active assents of three-fourths of the heritors in valuation required to be given antecedently to the process being raised; that without such active assents the action could not be instituted (b). If such was the law formerly, it is not so now. For while the statutory consent on the part of the heritors may be given before the process is brought, the process may be raised without such antecedent consent.

92. With the view of affording an opportunity to those heritors who have not previously given their consent to or judicially stated their dissent from the proposed measure, the Court is by the statute required to appoint special intimation to be made of the process to each of the heritors, and to sist procedure therein for a definite time. Those who, after such intimation and sist, neither judicially state their consent or dissent within the time allowed for doing so, are held to be and are accordingly dealt with as consenting heritors.

93. The judgment of reversal pronounced in *Paton v. University of Glasgow* (c) implies that the interlocutor order-

(a) Per Lord President Inglis (then Lord Justice-Clerk) in *Paton v. University of Glasgow*, 1864, 2 M’P. at p. 1309, reversed 4 M’P. (H.L.) 26.

(b) Per Lord Colonsay (then Lord President) in *ibid.*, 2 M’P. at p. 1308.

(c) *Supra*.

Consent may be given after process raised.

Intimation of process.

Procedure in regard to consent.

CHAP. I.

ing such special intimation to the heritors should distinctly mention the duration of the sist, and also the duration of the period (by the date of its commencement and its close or otherwise) before the expiry of which, if dissents be not judicially stated, consents will be implied (*a*). It has been laid down that "the consent of the heritors is not in the nature of a judicial consent as defenders, but is a pre-requisite to the process going on at all" (*b*). The consent here referred to includes, of course, both active and constructive assent on their part. In *Paton's* case the question was raised in the Court of Session, but not decided, whether an heritor who, from not timeously lodging a dissent, is constructively held to be a consenting heritor, can afterwards appear and state defences on the merits. Assuming the accuracy of the *dictum* just quoted, it goes some way to support an affirmative answer to this question, as does also the procedure in the case of *Campbell* (*c*).

Statutory consent though given does not secure a decree.

94. While the consent of the statutory proportion of the heritors (in cases where consent is enjoined) is of course a *sine qua non* to a decree of disjunction and erection being pronounced, it does not thence follow that such consent, or even the consent of the whole body of heritors, necessarily secures the success of the action. The case of *Cadder* in 1743 (*d*) is an instance where the whole heritors of the parish (being pursuers of the action) actively assented to

Case of *Cadder*.

(*a*) In this case the interlocutor pronounced by the Court ordered intimation of the conclusions of the summons to be made, once from the precentors' desks of the church of the parish to be disjoined, and of the chapel of the district to be erected, and also once in the *Edinburgh Gazette* and *North British Advertiser*, all which intimations were to be made at least ten days before the process should be again moved in Court; and, further, appointed twenty copies of the printed summons to be lodged with the session-clerks of the said church and chapel

respectively, for the use of such of the heritors or other parties interested as might apply for them.

(*b*) Per Lord President Inglis (then Lord Justice-Clerk) in *Paton*, *supra*, 2 M.P. at p. 1309.

(*c*) *Campbell v. Officers of State*, 1864, 3 M.P. 295. Here the Court appointed "the pursuers to intimate the libel and amendment especially to the Presbytery;" and in a subsequent interlocutor ordering intimation no mention is made of the heritors.

(*d*) Mentioned by Connell Par. p. 78.

and desired the disjunction of part of the parish, and its erection into a new parish. The Court, however, gave effect to the opposition made by the College of Glasgow, the titulars and defenders, who, besides contending that the measure was unnecessary in an ecclesiastical point of view, pleaded that its effect would be prejudicial to the revenues of the College, and that, after applying the teinds of the parish to the purposes specified in a charter in their favour from the Crown in 1670, and to other accustomed uses, the teinds would be exhausted. As no such change in the provisions of the Act 1707, c. 9, has been made by the 7 and 8 Vict. c. 44, as would imply that a different judgment would, in similar circumstances, be pronounced, the principle of law involved in it may be regarded as still applicable. In one case, where the petitioners proposed to disjoin from the old parish and to include within the new parish to be erected a district extending to 15 square miles and containing only fourteen families, the object being to include a sufficient portion of land belonging to the principal heritor to give an adequate stipend to the minister, the Court refused to sanction the proposed boundary (a).

95. The prominent or leading object to be served by the disjunction of a district, and its erection into a separate parish *quoad omnia*, is that of the better propagation of the Gospel, and the improved spiritual condition and welfare of the inhabitants of the district specially, and of the parish generally. Accordingly, this is an appropriate and essential ground of action in processes of this description (b), and should be specifically averred and libelled on in the summons (c). In deciding whether the proposed measure is to be authorised or refused, the Court take into consideration

Leading purpose of parochial erections.

(a) Smith, 1867, 4 S.L.R. 109.

(b) The same remarks apply with equal if not greater force to disjunctions and erections *quoad sacra*, which in their results are substantially con-

fined to alterations in the ecclesiastical constitution of the parish.

(c) Per Lord President Inglis (then Lord Justice-Clerk) in *Campbell v. Officers of State*, *supra*, 3 M'P. at p. 298.

CHAP. I.

the interests — religious, ecclesiastical, and civil — of the inhabitants both of the district proposed to be erected and of the parish to be dismembered ; and, speaking generally, it must be made out that substantial advantage is likely to follow before the Court will sanction the change of existing parochial boundaries (*a*).

Objections to
erections.

96. Among the leading objections, which may, with probability of success, be stated against the proposed measure, may be mentioned—(1) the sparse population or the overpopulation of the district to be erected ; (2) its incapacity, from deficiency of free teind, to afford a suitable stipend to a minister ; (3) the inconvenient situation of the proposed new parish church as a place of worship for the bulk of or for a large proportion of the inhabitants of the district (*b*) ; and (4) insufficiency in point of accommodation or structural condition of the intended church. The two former are the more serious objections, as each of the two latter may be obviated by an obligation either imposed on or voluntarily undertaken by the heritors of the new parish to provide a suitable place of worship.

Campbell v.
Officers of
State.

97. Each of the first three of the above objections occurred in the case of *Campbell v. Officers of State* (*c*), as brought or subsequently insisted in. The district of Brownfield, the proposed parish, was, as originally set forth in the summons, deficient in free teind. The population of the district, as ultimately alleged on amendment, extended to 54,200 souls. The chapel of ease, proposed as the parish church, was situated at a great distance from a large section of the inhabitants for whose use mainly it was professedly intended. In point of fact the chapel was not

(*a*) See *per curiam* in *Presbytery of Chirnside v. Heritors of Coldingham*, 1847, 10 D. at p. 14.

(*b*) See *Smith*, 1867, 4 S.L.R. p. 109. Here the proposed measure was calculated to inconvenience a section of the inhabitants of the district in the matter of attendance

at church. The main object in the disjunction of a portion of the territory of the existing parish was, as explained *supra*, p. 49, to carry out a scheme for providing a stipend to the minister of the proposed new parish.

(*c*) 1864, 3 M.P. 295.

locally situated within the bounds of the district, and the question was here raised whether, apart from inconvenience of situation practically experienced, a church situated outwith the territory of the district could be a "suitable church" for the district, if erected into a new parish, within the meaning of the 4th section of 7 and 8 Vict. c. 44.

98. In the case just mentioned, the point occurred whether a district could competently be erected into a parish *quoad omnia*, part of which district consisted of a parish or parishes already erected *quoad sacra*, and provided with churches and ministers endowed and established. Such an erection would involve liability for stipend on the part of many persons who were not under the pastoral superintendence of the incumbent of the parish to be erected *quoad omnia*. This was characterised "as a great anomaly" and "inconsistent with the spirit and principle of the ecclesiastical arrangements of Scotland since the Reformation" (a). This statement seems an exaggeration. The same incident attends every erection *quoad sacra*.

Can parish
quoad sacra be
erected into
one *quoad
omnia*?

99. Section 6 of the Act authorises the Court, if they see cause, to declare the lands disjoined still to remain, notwithstanding their erection, a part of the former parish *quoad* the support and management of the poor. In consequence of this discretionary power so vested in the Court, it seems proper to insert in the summons, after the leading conclusion for erection of the district *quoad omnia*, an alternative conclusion applicable to the proviso now mentioned regarding the poor, and also to education and other civil concerns (b).

Management of
the poor.

100. Except as regards the support and management of the poor, the Act 7 and 8 Vict. c. 44, does not appear to qualify the effect which law attaches to the disjunction of lands and their erection into an independent parish. As

General effect
of decree of
erection.

(a) Per Lord President Inglis (then Lord Justice-Clerk) in *Campbell v. Officers of State*, *supra*, 3 M.P. at p. 299.

(b) See *per curiam* in *Presbytery of Chirnside v. Heritors of Coldingham*, 1847, 10 D. at p. 15.

CHAP. I.

such a measure, however, is usually provided by an arrangement among all or certain of the parties interested in the proposed change, the summons usually contains not only the leading conclusions applicable to the disjunction and erection of the new parish, and to the status of its minister, but also other conclusions applicable to and intended to regulate various parochial rights and obligations, such as those connected with the minister's stipend, the building and upholding of the church, and the extent and nature of manse and glebe to be supplied. In so far as these and similar parochial rights and obligations are not ascertained and fixed in the decree itself, they will remain subject to the ordinary legal principles applicable to parishes *quoad omnia*, and may be vindicated or enforced accordingly.

Case of Maryhill.

101. Consistently with this general doctrine, it was laid down in the case of Maryhill—which was held to be a disjunction and erection *quoad omnia* under the 7 and 8 Vict. c. 44, and where the church of the new parish was built—that the heritors were bound to keep it in repair, and that they were liable “in all the other parochial burdens except the main-tenance of the poor;” and, on the other hand, that they were entitled to have seats allotted to them in the church (a). In the case of North Bute (b), which was also held to be a disjunction and erection *quoad omnia*,—effected, however, prior to the Act of 1844,—it was ruled that the heritors of the new parish of North Bute were not liable for any part of the salary of the schoolmaster of the old parish of Rothesay, whose salary had been increased in 1861 in terms of the 24 and 25 Vict. c. 107.

North Bute.

(a) See per Lord Justice-Clerk Hope in *Reid v. Commissioners of Woods*, 1850, 12 D. at p. 1215. In the later Maryhill case, *Oliver v. Heritors of Maryhill*, 1st November 1901, it was held by Lord Low that when the decree of erection of a new parish *quoad omnia* was silent in regard to a manse, the minister was not entitled to demand one, it being the practice of the

Court to regulate these matters in their decrees of erection. The case of Bute, however, mentioned in the next note was not considered by his Lordship, and the *dicta* therein seem irreconcilable with his grounds of judgment.

(b) *Marquis of Bute v. Magistrates of Rothesay*, 1864, 2 M.P. 1278.

SECTION XVI.—*Disjunction and Erection of Districts Quoad Sacra under 7 and 8 Vict. c. 44, sections 8-11.*

CHAP. I.

102. When any person or persons have built or acquired, or have undertaken to build or acquire, a church, and shall have endowed or undertaken to endow it, the Teind Court may (a), on the “application” of such person or persons, not exceeding five, or of two-thirds, or ten of such persons, if exceeding five, after due intimation to all parties having interest, and without concurrence of the heritors (b), erect such church into a parish church, and designate a district to be attached thereto as a district *quoad sacra*, and disjoin the same from the parish to which it formerly belonged, and erect it into a parish *quoad sacra*; provided—1st, that the titles to the church shall be so conceived as inalienably to secure it as the church of the new parish: in this connection it has been found that a lease for 999 years will not suffice (c); 2nd, that due provision be made for the maintenance of the fabric of the church; and 3rd, that a stipend of not less than £100 per annum, or 7 chalders of oatmeal, calculated at the highest fiars prices, exclusive of a sum for communion elements, be provided and permanently secured to the minister, together with a suitable manse (including offices), and that due provision be made for the maintenance of the fabric thereof; or—where no manse is provided—a stipend of not less than £120 per annum, or 8½ chalders of oatmeal, calculated as aforesaid.

When an erection *quoad sacra* may be made.

103. As the obligation on the heritors of the district, when erected, to maintain the fabric of the church of the original

Fund for maintaining the church, &c.

(a) “May” is here by no means equivalent to “shall.” The Court has an undoubted discretion even though the Church Courts and the majority of the parishioners desire the change.—See *Murray v. Magistrates of Edinburgh*, 1874, 1 R. 482; *Irvine v. Maxwell*, 1873, 11 M’P. 489; *Stevenson v. M’Nair*, 1879, 7 R. 270; *Macdougall v. Oban Kirk-Session*, 1880, 17 S.L.R. 501.

(b) The case of Carmunnock in 1725 has been already mentioned (*ante*, p. 41), and there, in a somewhat analogous process of disjunction and annexation of lands *quoad sacra*, the Court treated the statutory consent of the heritors under the old law as essential.

(c) *Donaldson*, 1873, 11 M’P. 489.

CHAP. I.

Seat-rents.

Payment of officials.

Maintaining church and manse.

Form of application.

parish still continues (*a*), the Act contemplates as necessary the creation of a fund for the maintenance of the fabric of the church of the district erected into a parish *quoad sacra*, and for meeting other expenses necessarily incurred in dispensing the ordinances of religion thereat. With this view a portion of the sittings in the church, not exceeding one-fifth of the whole, is directed to be let at rents not above the rate fixed by the Presbytery of the bounds. One pew is to be appropriated, rent free, for the minister, and another pew, also rent free, for the officiating elders. The remaining portion of the seats is to be let in such manner as the minister for the time being, and the person or persons liable for the repair of the church and the clergyman's salary, or, in case of disagreement, the Sheriff of the county, may determine. The money which is derived from the seat-rents may be applied in defraying the necessary expenses of a precentor, a beadle or kirk officer, and other expenses necessarily incurred in dispensing the ordinances of religion not otherwise provided for, and in maintaining in repair the fabric of the church, or of the manse, or for the relief of such person or persons as may have undertaken to uphold the same, or who may be liable for the stipend due to the minister. Collections may lawfully be made at the church doors for any of these purposes.

104. The form of application is by way of printed petition to the Lords of Council and Session, as Commissioners for the Plantation of Kirks and Valuation of Teinds, at the instance of the party or parties who have (1) built or acquired, and (2) endowed the church of the district to be erected, or undertaken so to do. Neither of these conditions, taken separately, seems sufficient. Both must, apparently, concur to confer a good title to make the "application." When the number of persons so qualified does not exceed five, the words of the

(*d*) See per Lord Justice-Clerk Hope in *Reid v. Commissioners of Woods*, 1850, 12 D. at p. 1215.

statute seem to imply that they must all be petitioners. When their number does exceed five, then the petition may be competently presented by two-thirds, or ten, of such persons. In a great variety of cases such petitions have been at the instance of contributors to the Church of Scotland Endowment Scheme, the convener of the relative committee, the trustees appointed in connection with said scheme, and the persons in whom *quâ* trustees is vested, by the deed of constitution of the chapel (if any), the church itself, and who have provided, or have undertaken to provide, the statutory endowment for the minister thereof.

105. With the view of explaining the reason for the ap- Matters set forth in petition.
plication, the petition usually contains statements with respect to the existing population, and the territorial extent of the parish, as indicative of the expediency of creating within it a new and independent cure of souls. The fact of the erection of a church by the petitioners, and any material circumstances therewith connected, or otherwise the proposed erection by them of a new church, ought, of course, to be set forth; and further, distinct information should be given as to the nature and extent (being not less than that required by statute) of the endowment already granted, or proposed to be granted, with such explanatory details as are conducive to a correct appreciation by the Court of the precise amount of the endowment, and the nature of the security on which its continued existence depends. If a manse for the clergyman has been, or is to be, provided, this should be mentioned; and in the former case the title by which the building and offices are held should be stated, in order to meet the statutory requirement that the same shall be inalienably held for the minister of the church. The provision made, or proposed to be made, for the maintenance of the fabric of the manse and offices should also be explained (*a*). The size and situation *quoad* the

(*a*) When a deed of constitution is granted by the General Assembly, it commonly contains specific provisions regarding, *inter alia*, the proprietary

CHAP. I.

entire parish of the district proposed to be erected ought to be set forth with as much precision as possible, and if any peculiarity, arising from extent of population, local conformation, or otherwise, attaches to the district proposed to be erected into a parish, these matters may properly be noticed. A convenient and common way of describing the proposed new *quoad sacra* parish is by a plan, containing a tracing of the entire parish, on which, by means of a distinctive colour, is indicated that portion of it which is proposed to be erected *quoad sacra*.

Prayer of
petition.

106. The prayer of the petition contains a crave—
(1) for intimation; (2) for inquiry into the facts set forth;
(3) for erection of the church into a parish church, and the district into a parish in connection with the Church of Scotland, and relative disjunction from the old parish; (4) for a declaration that the ministers and elders of the church shall enjoy the status of ministers and elders of the Church of Scotland. The Court usually ordains the prayer of the petition to be intimated once from the precentor's desk of the parish church, and of the district chapel (where such exists), on a Sunday after morning service, and to be advertised once in the *Edinburgh Gazette* and once in a daily newspaper, and a certain number of copies of the petition to be lodged with the session-clerks of the parish church and district chapel for the information of parties interested. Where the district or part of it proposed to be erected forms part of an existing *quoad sacra* parish, intimation falls to be made at the church of the *quoad sacra* parish as well as at the church of the old parish (a).

Intimation.

Grants of land
by heirs of
entail and
others.

107. By the 10th section of the Act, any heritor or heir of entail, or the guardian of any person legally incapacitated, may, subject to the conditions therein specified, grant a disposition of such portion of the lands belonging to him or his

right to the church, and the endowment of the minister, and the relative statutory requirements. The deed of

constitution is generally referred to in the petition.

(a) Whitelaw, Petr., 1875, 3 R. 88.

wards as may be necessary for the site of such church or manse, and also a portion of ground near the same for a churchyard or glebe, not exceeding in whole four acres, to be allocated at the sight of the Sheriff or some one appointed by him.

108. For the purpose of endowing a *quoad sacra* parish, any heir of entail in Scotland is empowered by section 11 to burden his entailed lands situated within any district so erected, or grant security for payment out of the free rents thereof, of a sum not exceeding the rate of three per cent. of the average free rental of the estate for the five immediately preceding years, but in no case exceeding the sum of £120. Such heir of entail may also, subject to the conditions mentioned in the section, burden or grant security as aforesaid for upholding the fabric of the church, manse, and offices to the extent of the payment of a sum not exceeding in any one year one per cent. on the cost price or estimated value of the church, and of one per cent. on the cost price or estimated value of the manse and offices.

109. The phraseology of some of the provisions of the Act is hardly intelligible in relation to the manner in which the Act has been worked out in practice, but the meaning becomes clear when it is understood what the framers of the Act had in contemplation. At the date when the Act was passed, the idea of endowment by voluntary subscriptions from a large number of persons was still inchoate. What the framers of the Act had in view was that a man or several men of wealth—probably landed proprietors—would build a church, and bind himself or themselves, giving adequate security over land or otherwise, to pay or guarantee a certain stipend and to keep up the church. This view is borne out by the fact that this was the form which the earliest endowments took, and also by the circumstance that when the Church of Scotland Endowment Scheme was first proposed in 1846 the idea of raising capital sums for endowments by general sub-

Burdening entailed estates with endowment.

The scheme contemplated by the statute not adopted in practice.

scription was rejected by many as chimerical. Accordingly, whilst the Act does not exclude the idea of the obligation for stipend and upkeep being undertaken as voluntary liberality, it does not require this; but by section 9 it permits the founders to recoup themselves in each year out of special church-door collections and seat rents. This idea was no doubt suggested by the practice which had prevailed in connection with the provision of new churches within burghal areas. The Act thus contemplates an arrangement under which the church of the parish *quoad sacra* may pay its own way, and the persons responsible for stipend and upkeep be virtually only guarantors. As regards control, the Act seems to contemplate that these persons may be placed in relation to the church very much in the position of heritors of an old parish, except that whereas on the one hand their liability has been incurred voluntarily, so, on the other hand, recoupment from church sources is allowed. Although in practice the Act has worked out in a very different way, and the endowment is provided by a capital sum instead of by an obligation for an annual payment, a body has been created by the intervention of the General Assembly of the Church, whose position in some respects very nearly represents that of the body of persons referred to in the Act, viz., the trustees under the deed of constitution granted by the General Assembly. These trustees hold the title to the endowments, and they grant an obligation which is lodged in the process of disjunction and erection, to apply the seat rents and the special collections, so far as necessary, in the upkeep of fabrics. The usual obligation is in these terms:—"The trustees bind themselves, as trustees foresaid, and their successors in office, to apply the seat rents, as well as any special collections made for the purpose permitted by the said Act of Parliament, primarily in maintaining the fabrics of the church and manse in thorough order and repair, and to uphold the building in that condition in all time coming."

110. It does not appear from the terms of the Act that the preparation of Constitutions by the General Assembly was contemplated; indeed the Act, as is well known, was passed to provide a substitute for the creation of territorial charges with a minister and a kirk-session by the Courts of the Church, without the intervention of the Court of Teinds, a proceeding which had been found to be illegal in the *Stewarton* case (a). The General Assembly, however, continued to grant deeds of constitution preliminary to the disjunction and erection by the Court of Teinds, providing generally for the management of the new church, and, *inter alia*, for the appointment of trustees in whom are vested the fabrics and endowments. It may here be noticed that although the Act of 1844 makes no provision for the constitution of a trust, yet the subsistence of such trusts has been recognised by the Legislature, as in the United Parishes (Scotland) Act, 1868, which provided for certain old parish churches being utilised as churches of *quoad sacra* parishes, such churches were declared to be "not subject to the provisions of any trust constituted in terms of " the Act of " 1844, or to any trust applicable to a church erected by " voluntary contributions as the church of a parish *quoad sacra*." A similar provision with reference to glebes occurs in the United Parishes (Scotland) Act, 1876.

Constitutions
granted by
General
Assembly.

111. Considerable misunderstanding prevails as to the position of a parish *quoad sacra*. It is very generally supposed that such a parish has a separate existence only for certain subordinate or adventitious purposes, and that fundamentally the old parochial divisions remain unaffected. This, however, is a mistake. If regard be had to the origin of the parochial system and the distinctive attributes of a parish, it will be found that the new area, the *quoad sacra* parish, is fundamentally a parish, and that the old area within which the *quoad sacra* parish has been erected continues to exist

A parish *quoad sacra* is a parish proper.

(a) *Cunninghame v. Presbytery of Irvine*, 1843, 5 D. 427.

CHAP. I.

as a separate area only for purposes which are mere accretions round the original and fundamental parochial idea (a).

SECTION XVII.—*Erection of Gaelic Churches and Congregations into Parishes under 7 and 8 Vict. c. 44, ss. 12 and 13.*

Congregational
parish *sine*
territorio.

112. In dividing large and populous parishes wherein a number of persons reside who understand only the Gaelic language, the statute authorises provision to be made for their spiritual wants by appointing religious instruction to be communicated to them in that language; and it enacts that when a separate church has been built for such congregation, and a permanent endowment secured for the same, out of teinds or otherwise, to the satisfaction of the Court, such church and congregation may be erected into a separate parish although its members be scattered and no exclusive parochial territory be assigned. The minister and elders of such parish when erected possess the status and rights of parish ministers and elders, but no pastoral superintendence or discipline over any persons not members of the congregation or their families, or resident within the district, if any, assigned to such parish (b).

Is congrega-
tional erection
an independent
measure.

113. The enacting clause in the 12th section is suggestive of the view that the Legislature contemplated the erection of Gaelic congregations into parishes, not as an independent measure, but only as part of a general territorial disjunction or division of a parish. In practice, however, this principle of construction has not been applied—such congregational erections *sine territorio* having been effected under applications specially confined to this object.

(a) *Per curiam* in *Hutton v. Harper*, 1875, 2 R. 893, 3 R. (H.L.) 9.

(b) Such parishes are very similar to those known to the Canon law under the term "*parochiæ gentilitiæ*," concerning which Ferraris says: "*Pluribus in locis adsunt parochiæ, quæ non distinguuntur per domos materiales, et per determinatos districtus locorum, sed per populos, seu*

familias, et istæ vocantur parochiæ gentilitiæ earundem familiarum, ita ut si eadem familiæ commorentur in districtu alterius parochiæ, subsint nihilominus jurisdictioni suæ parochiæ gentilitiæ, et has parochias non extendi ad alias familias diversas ab illis, pro quibus erectæ fuerunt, ad longum probat Ursaya."—*Biblioth. Canon. voce "Parochia,"* § 17.

114. The statute does not specify either the form of process to be adopted in the parochial erections now alluded to, nor by whom it is to be instituted. Not very many of such erections have occurred; but while in the majority of instances these have been applied for by petition at the instance of those who have built and endowed or undertaken to endow the church, in one case (*a*) a few years after the date of the statute, the application was by summons. Here it was decided (*b*)—the General Assembly having previously approved of the arrangement—that it was not necessary that the services performed at the church at both the two diets of worship on Sundays should be in the Gaelic language. It was held sufficient to justify the erection that the services at one only of said diets was in Gaelic. It is not a good objection to the erection as a *quoad sacra* parish of the English-speaking district of a town that some of the people of the proposed parish cannot speak English (*c*).

CHAP. I.

Form of
process.

Gaelic services.

SECTION XVIII.—*Disjunction and Erection of Parliamentary Districts Quoad Sacra under 7 and 8 Vict. c. 44, s. 14.*

115. With a view to increase the church accommodation, and the number of ministers in certain large parishes in the Highlands and Islands of Scotland, the Acts 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, were passed. Under the former statute the Commissioners appointed by it were authorised to erect or purchase, and fit up within the parish, buildings as additional places of public worship, the cost of which, as well as the stipend to the assistant ministers appointed thereto, were payable out of public funds to the specified extent, and in a particular manner. Without referring to its other provisions it is sufficient here to remark that while section 15 provided that the minister appointed to any such additional church

Assistant
ministers
under 4 Geo.
IV. c. 79.

(*a*) Christian Knowledge Society
v. Magistrates of Edinburgh, 1850,
12 D. 1216.

(*b*) *Diss.* Lord Justice-Clerk Hope.
(*c*) *Macdougall v. Oban Kirk-Ses-*
sion, 1880, 17 S.L.R. 501.

CHAP. I.

was to remain “in the same situation as an assistant minister
“now is, in respect of the minister of any parish in Scotland
“of whom he is the assistant, save and except that he must
“perform the duties of a minister of the Gospel at the Church
“to which he is appointed by virtue of this Act,” no special
district within the parish was set apart in connection with
the church so allocated to the superintendence of the assistant
minister.

District allo-
cated by 5
Geo. IV. c. 90.

116. To supply this omission the 5 Geo. IV. c. 90 enacted, *inter alia*, that a certain district within the parish where the additional church was erected or provided was to be defined or set apart by the Commissioners, to which the pastoral labours of the assistant minister were to be confined. But while assimilating in certain respects the position of these assistant ministers and district churches to parish ministers and churches, this Act did not confer in their entirety the privileges of parochial status, even *quoad sacra*, on either.

General
Assembly's
declaratory
enactments.

117. With the view, apparently, to remedy this supposed defect in these two statutes, the General Assembly in 1833 passed an enactment as to Parliamentary churches (*a*), whereby it was declared (1) that the districts provided with churches under these two statutes were from 25th May 1833 erected into parishes *quoad sacra*, and to this effect disjoined and separated from the parishes of which, notwithstanding, they continued to form a territorial part; (2) that ministers of such districts were, within the limits of the same, to exercise and enjoy all the powers and privileges competent to ordinary parish ministers; and (3) that the ministers of these districts were to be constituent members of all Church courts and judicatories, with the same powers as those exercised and enjoyed by ordinary parish ministers. In the following year the General Assembly passed a similar enactment (*b*) in regard to the ministers of chapels of ease. These enactments were subse-

(*a*) Dated 25th May 1833, cap. vi. (*b*) Dated 31st May 1834, cap. ix.

quently found by repeated decisions ineffectual to operate that change in the law which they contemplated (*a*). This was, however, accomplished by 7 and 8 Vict. c. 44, which authorises the disjunction of the parliamentary district from the parish to which it belonged, and the erection of the same into a parish *quoad sacra*. The existing additional place of worship and the dwelling-house of the assistant minister may be appointed to be the parish church and manse of the new parish, and the provisions contained in the said two Acts of Geo. IV. in regard to maintaining these buildings in repair may be held as sufficient provisions, and the stipend of £120, payable under the statutes, may be held as a sufficient stipend.

Effect of 7 and
8 Vict. c. 44.

118. As the erection of a district into a parish *quoad sacra* leaves unaltered the civil rights and obligations of its inhabitants (*b*), the Court is inclined to authorise the measure in those cases where—adequate security being given for the endowment of a church and its minister—it is likely to be of advantage to the community in a religious point of view. The fact that the boundary line of the district if erected will intersect a parliamentary burgh is immaterial. Even considerable opposition on the part of the heritors of the parish will not prevail if the application be otherwise well founded (*c*). At the same time, if the demands of the parish on the incumbent's labours are not great, and if no practical benefit is expected to be conferred on the community by the change, the Court will not interfere with existing parochial arrangements (*d*).

Policy of the
law as to erec-
tions *quoad*
sacra.

(*a*) As an example to this effect, see *M'Donald v. Campbell*, 1836, 9 Jur. 5, where it was held that, as the right to levy fees for proclamation of banns was a civil right, the clerk of a kirk-session of a parliamentary district erected into a parish *quoad sacra* by the General Assembly was not entitled to exact them.

(*b*) The heritors "are in a position
" in no way different from that of the

" other parishioners." — Per Lord Benholme in *Pearson v. Magistrates of Dunbar*, 1862 24 D. at p. 1359.

(*c*) *Pearson v. Magistrates of Dunbar*, *supra*, 24 D. 1357.

(*d*) *Stevenson v. Magistrates of Edinburgh*, 1855, 17 D. 592. Here the population of the parish was about 10,000. About one-third only of the sittings in the parish church were let. The application, which

CHAP. I.

Burghal as well
as landward
districts.

119. It has been expressly ruled in one reported case (*a*), and the principle has been applied in numerous instances (*b*), that the provisions of 7 and 8 Vict. c. 44, in regard to parochial disjunctions and erections apply to burghal as well as to landward parishes.

SECTION XIX.—*Disjunction and Erection of Parliamentary Districts Quoad Omnia under 7 and 8 Vict. c. 44, s. 15.*

Effect of erection of district
quoad omnia.

120. When a district, with a place of worship already built, has been set apart under 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90, the Court may, on an “application,” and with the requisite consent of the heritors, erect such district by itself, or along with other territory, into a parish *quoad omnia*, and may appoint such place of worship, and the minister’s dwelling-house, to be the church and manse of the new parish. On this being done, the Commissioners under the said Acts cease to hold these buildings; the special statutory provisions for upholding them no longer apply; and the burden of doing so falls on the heritors according to the ordinary rules of law.

Minister’s
stipend.

121. In fixing the future stipend of the minister, the Court compute as part thereof the sum paid as stipend under these two statutes, which continues to be paid to him. The “consent of heritors,” required by the 7 and 8 Vict. c. 44, to an erection *quoad omnia* of a parliamentary district, seems to be that pointed out in section 1, viz., the consent of the heritors of the major part of the valuation of the parish.

SECTION XX.—*Disjunction and Erection of United Parishes Quoad Sacra under 31 Vict. c. 30.*

122. This Act repeals the 29 and 30 Vict. c. 77, and in was at the instance of the minister and kirk-session of the parish, was opposed by the Magistrates of the city, as patrons of the church, and refused *hoc statu*.

(*a*) Christian Knowledge Society

v. Magistrates of Edinburgh, 1850, 12 D. 1216.

(*b*) As examples to this effect, see *Stevenson v. magistrates of Edinburgh* and *Pearson v. Magistrates of Dunbar*, *supra*, and cases cited *supra*, note (*a*), p. 53.

lieu thereof provides that, in the case of any united parish, containing two or more churches, any persons who have undertaken to endow one of them, with a district to be attached thereto and forming part of such parish, may apply to the Teind Court for the disjunction of such district, and its erection into a parish *quoad sacra*, in terms of section 8 of 7 and 8 Vict. c. 44. The persons applying for such disjunction and erection do not require to make any provision for the maintenance of the fabric of the church.

CHAP. I.

Application to
disjoin united
parish.

123. In the decree of disjunction and erection the Court may declare the church so to be endowed to be thereafter the church of the new parish. As a consequence of such declaration, the minister and kirk-session of the new parish *quoad sacra* acquire all those rights in relation to this parish which were formerly vested in the minister and kirk-session of the united parish. The church of the new parish is declared exempt from any trust constituted in terms of the 29 and 30 Vict. c. 77, or applicable to a church erected by voluntary contribution as the church of a parish *quoad sacra*.

Rights of
minister and
kirk-session.Church exempt
from trusts.

SECTION XXI.—*Parochial Boundaries, how established.*

124. The Canon law was extremely jealous of any alteration in the boundaries of parishes, the extent and limits of which having been once fixed by competent ecclesiastical authority, *i.e.* by the pope or bishop, were, as a general rule, held incapable of alteration by any less formal and solemn sanction. On this principle it was that usage and report, though extending over a prescriptive period, were not allowed to operate in determining the extent and identity of a parish, unless no trace existed of what its boundaries, as fixed by ecclesiastical authority, really were (*a*).

Canon law
jealous in
regard to
parochial
boundaries.

(*a*) Thus it is laid down in the Decretals (iii. 30, 4)—“*Fines parochiarum de quibus constat, vel finibus coherrentia præscribi non possunt.*” Among the subjects to which the

law of prescription does not apply, Ferraris includes parochial boundaries fixed by competent authority.—Biblioth. Canon. voce *Præscriptio*, §§ 1, 11. Barbosa, De Off. et Potest.

CHAP. I.

Principle of
our law.

125. The rules of our law in this matter are somewhat similar in principle, although not in all respects so rigorously applied. The best evidence that parishes were united, or that lands were erected or annexed, is, according to our law, the statute creating the union, erection, or annexation; or a decree to this effect pronounced by the Parliamentary Commissioners or the Teind Court. When such evidence exists, it should be founded on and produced; or its loss, and the facts which render such loss certain, or probable, should be averred (*a*).

Construction
of decrees.

126. If the language of the statute or decree be distinct and explicit, it appears binding and operative in all respects, even although inconsistent with or contradicted by inveterate usage (*b*). When, however, its language is indistinct or ambiguous, and it is matter of doubt what the precise effect or extent of the parochial arrangement therein referred to really is, or what the particular lands are to which it applies, then the usage and possession which have followed upon the obscure meaning of the language of the document will "give" an interpretation to that obscure meaning, and reduce that "uncertainty to a fixed sense." Contemporaneous exposition is the best interpreter of doubtful laws or the ambiguous meaning of ancient documents; and such usage will control or expound them (*c*).

Contemporaneous
usage.

127. Even if the usage be not actually carried back to this contemporaneous date, yet if usage or possession to a given effect, following on a formal union, erection, or annexation, be carried back a long period of time without proof of an anterior contrary usage or possession, the period of con-

Episcopi, pt. iii. alleg. 131, § 4; and Boehmer, Jus Eccles. Protest. lib. ii. tit. 26, § 34, express doctrines to a similar effect.

(*a*) In *Campbell v. Campbell*, 1852, 15 D. at p. 10, Lord Colonsay (then Lord President) says: "We do not require to have the decree of union produced, if we are satisfied upon the evidence that there was a union."

See also *Presbytery of Selkirk v. Scott*, 1753, M. 15,823.

(*b*) This doctrine is implied in the judgment in *Alexander v. Pinkerton*, 1826, 5 S. 185.

(*c*) Per Lord Brougham in *Magistrates v. Heritors of Dunbar*, 1835, 1 S. & M'L. at p. 195, and see *Broom's Legal Maxims*, 2nd ed. pp. 534, 712, *et seq.*

temporary exposition may fairly be said to have been reached (*a*), and the ambiguous language of the instrument will be read consistently therewith (*b*).

128. Many of the decrees alluded to, however, were destroyed along with numerous records of the Teind Court by the fire in 1700 (*c*), or have otherwise been lost. From necessity, therefore, in some instances, and high expediency in others, the principle has been recognised that production of the decree uniting or erecting a parish is not, in all circumstances, absolutely essential to the proof of the fact. This may be established by evidence which is not only less formal in character, but different in kind from that necessary to establish the precise tenor of the decree. Accordingly, such evidence is not, strictly speaking, received as an equivalent for the decree, but rather as tending to instruct inferentially the fact that such a decree has been pronounced (*d*). It is the decree pronounced by a tribunal of competent jurisdiction, and it alone, which impresses upon a particular district the status of a parish. Usage, report, acquiescence, although inveterate, cannot, strictly speaking, operate this result, however strongly they may suggest the inference that it has been effected (*e*).

129. While the construction put on the nature and effect

(*a*) Per Lord Brougham in *Magistrates v. Heritors of Dunbar*, *supra*.

(*b*) A doctrine to this effect was applied in *Todd v. Sandison*, 1868, 5 S.L.R. 496, where usage and possession over a period of eighty years was held to interpret the meaning of the Act 1633, c. 142, in regard to the particular portions of land which, by that statute, were disjoined from the parish of Coldingham and erected into the parish of Eyemouth.

(*c*) In the pleadings in *Drummond v. Heritors of Monzie* (1773, M. 7920), it is stated that "the original decret of disjunction and annexation is now lost, having been destroyed, with the other records of the Teind Court and of the General Assembly, by the fire which happened in October 1702."—

See Session papers, Campbell's Coll. vol. xxii. No. 61. The great fire in Edinburgh, however, by which a large pile of buildings on the eastern and southern sides of the Parliament Close, with the Exchange, were destroyed, broke out on Saturday night, 3d Feb. 1700.—See Maitland's *History of Edinburgh*, ed. 1753, p. 112.

(*d*) *Campbell v. Campbell*, 1852, 15 D. 5; *Presbytery of Stirling v. Heritors of Larbert and Dunipace*, 18th March 1902.

(*e*) *Per curiam* in *Heritors of Irvine v. Heritors of Dundonald*, 1824, 3 S. 173. In *Presbytery of Selkirk v. Scott*, 1753, M. 15,823, it is laid down that "all parishes have originally been divided by some writing."

Decree of union sometimes not produced.

CHAP. I.

Proving tenor
sometimes dis-
pensed with.

of the secondary evidence so allowed, assumes that a statute or decree parochially uniting, erecting, or annexing lands was actually passed or pronounced, the Court does not, in the case of its alleged loss, always require its tenor to be proved. A doctrine to this effect has been expressed and acted on in various instances (*a*).

Adminicles in
proof of par-
ochial union,
&c.

130. The adminicles of evidence, which, in the absence of a decree or statute, are ordinarily founded on to establish or disprove a parochial union, erection, or annexation are various. In general, they partake more or less of the nature of data derived from statements or admissions occurring in judicial proceedings, or in parliamentary records, or those of church courts, or of statutory bodies, or from facts connected with the ecclesiastical or parochial government, constitution, or condition of the district. Among such adminicles may be mentioned statements, admissions, or decrees—in actions for augmentation of stipend, modification, and locality; for valuation of teinds; for the designation of manses, glebes, or churchyards; for building or repairing churches and schools—tending to imply that the district in question was united, erected, or annexed, or to rebut that inference. The description of the lands parochially in the cess-books of the county, or in old charters or Acts of Parliament (*b*); the entry of them in connection with the name of their owner in the Register of Births, Deaths, and Marriages for a particular parish (*c*); the circumstance as to whether there is, or has

(*a*) See Presbytery of Selkirk, *supra*; and Elchies, *Teinds*, No. 38 and Notes; Heritors of Irvine, *supra*; and Campbell v. Campbell, *supra*. In the first-mentioned case the Presbytery of Selkirk sought to have it found that Long Newton, as a separate parish, should have an incumbent of its own with a competent stipend. In defence the heritors maintained that Long Newton had in 1684 been annexed to the parish of Ancrum by a decree of the Commissioners, which, however, had been lost. Without disputing that such a decree

had been pronounced, the Presbytery contended that the defenders could not found upon it without proving its tenor. The Court, however, repelled this contention. See per Lord Ordinary Cockburn in *Lynedoch v. Liston*, 1836, 14 S. at p. 376.

(*b*) See Common Agent in Locality of Kirknewton v. Liston, 1831, Shaw's Teind Cases, 271. Larbert Case, note (*d*), p. 67.

(*c*) See Todd v. Sandison, *supra*, 5 S.L.R. 496; Minister of Rescobie v. Carnegie, 1869, 7 M.P. 514.

been, more than one incumbent (*a*) or schoolmaster in the district; more than one manse, glebe, church, or churchyard, or school; more than one patron exercising the right of presentation—are all matters of suggestive import (*b*).

131. While the testimony of old people regarding the alleged parochial locality of lands is not irrelevant in itself, the weight to be attached to such evidence is, of course, dependent on the period to which it extends back, and the degree of precision and definiteness attaching to it; and is, in the ordinary case, less trustworthy than documentary evidence bearing on the subject, such as plans, rentals, tacks, &c. (*c*). The very configuration of a district of country may be suggestive of its existence originally as two separate parishes, or as a single parish (*d*). From these and other impartial sources of information or elements of presumption, more or less expressive and trustworthy, inferences may be deduced tending to support, or rebut, a desired conclusion regarding the parochial constitution of a given district.

Oral testimony.

Configuration of district.

132. The existence of extra-parochial territory is inconsistent with the law of Scotland (*e*). Hence, every portion of ground in the country is assumed to form part of a parish. This principle, when pressed to its ultimate result, presupposes a presumption against a union, erection, or annexation, inasmuch as each of these conditions assumes a certain inversion or alteration of the original parochial arrangement of the country, and, according to the ordinary rules of pleading, lays on the party founding on such an alleged

No land extra parochial.

Bearing of doctrine.

(*a*) The force of this test is strengthened by the provisions of the Act 1581, c. 100, against pluralities of benefices.

(*b*) *Campbell v. Campbell*, 1852, 15 D. 5; *Presbytery of Stirling v. Heritors of Larbert and Dunipace*, 18th March 1902.

(*c*) See per Lord President Boyle in *College of Glasgow v. Earl of Eglinton's Trs.*, 1845, 7 D. at p. 970.

(*d*) This element occurred, and

apparently weighed with the Court, in their judgment in *Campbell v. Campbell*, *supra*, wherein the reader will find enumerated by Lord Curriehill, then Lord Probationer, a number of adminicles of evidence of the nature alluded to in the text.

(*e*) *Per curiam* in *Ross v. Earl of Haddington*, 1824, 3 S. 115. See also *H.M. Advocate v. Paterson*, 1848.—*J. Shaw, Justiciary Rep.* 1.

CHAP. I.

change the burden of proving it. When lands which, *ex concessis*, originally formed part of one parish, are alleged to have been disjoined therefrom and annexed to another parish, the *onus* of proving the annexation will fall on the party pleading this change as a ground of exemption from a parochial burden (*a*). A similar doctrine seems to apply in the case of a party pleading an annexation with a view to constitute such liability, or to enforce payment in respect thereof.

Onus of proof,
on whom laid.

133. Should a heritor attempt to evade payment of an assessment on the ground that the lands in respect of which it is imposed do not lie within, *i.e.*, do not form part of a particular parish, it may be that, in certain circumstances favourable to the heritor's defence, the *onus* of proof in the matter would be laid on the party attempting to enforce payment. For example, if the lands had been for a long period commonly reputed not to be, and dealt with as not being, situated in the parish liable to the assessment, but in another parish, the presumption would be in favour of the heritor; and—the proposed claim being prestatable only if his lands lie in the parish applicable to which the assessment is imposed—it would probably fall on the party *in petitorio* to establish that such was the case. A very slight presumption, however, in support of the opposite view might possibly shift the *onus*, and lay it on the heritor to show that his lands were not within the parish. Nor, in requiring this, would the heritor be called on to prove a negative; because the way in which alone he could discharge this *onus* would be by establishing the affirmative proposition, that his lands were situated in a certain other parish. When the heritor's defence resolves into the untenable plea that his lands are extra-parochial, more slender evidence than that required to determine the point as in a question *quoad* situation in one or other of different parishes, would be deemed sufficient to

(*a*) Heritors of Irvine *v.* Heritors of Dundonald, 1824, 3 S. 173.

establish that, for the purposes of the action at least, the lands must be held to form part of the parish within which the pursuer alleges them to lie (*a*).

134. Owing to the legal presumption against a subsequent alteration in the original boundaries of parishes, there is properly no limit in point of time recognisable as the period within which a party averring such a subsequent parochial alteration in a given instance, must confine his proof, short of that which dates back to the original creation of the parish. While it has been apparently assumed that parochial unions by the Roman Catholic bishops are proceedings of which the Court now might properly take cognisance (*b*), evidence will not ordinarily require to extend further back than the date of the Reformation (*c*).

How far proof
retro required.

135. In order to obtain a judgment which could be founded on hereafter as *res judicata* on the subject of the extent or boundaries of the parish, it would rather appear that an action having for its special object (as deducible from its conclusions) the ascertainment of this point would be necessary. Such action should be instituted by a party having a direct interest and a good title to raise for judicial decision the question involved in it, and should be directed against all parties interested in the result of the action as at its date. These remarks are, it is understood, in accordance with the views indicated by the Court in the unreported case of Cathcart (*d*). Here a summons was raised by the poor law inspector of this parish against the inspector for the parish of Govan, to have it found that the boundary between the two parishes was according to a specified line; and that the lands to the north of it lay within the parish of Cathcart, and, with the subjects thereon, were liable to be assessed for

Form of action
to determine
parochial
boundaries.

(*a*) See *Ross v. Earl of Haddington*, 1824, 3 S. 115.

(*b*) See per Lords Curriehill and Fullerton in *Campbell v. Campbell*, 1852, 15 D. at p. 10.

(*c*) *Per curiam* in *Ross v. Earl of Haddington*, *supra*, 3 S. at p. 116.

(*d*) *Grozier v. Kirkwood*, 1863, Lord Ormidale, Ordinary. Agents—John Martin, W.S., and Patrick, M'Ewen, & Carment, W.S.

CHAP. I.

Case of Cath-
cart.

the poor of that parish. To this action a preliminary plea was stated, that the pursuer was not the proper party to sue, and the defender not the proper party to defend, a general declarator of the parochial boundaries. In the course of the debate on this plea, a minute was lodged for the pursuer, to the effect that the action was only intended to ascertain and settle parochial boundaries and the rights resulting therefrom, "in regard to the administration of the Poor Laws, the "Nuisance Removal Act, and other Acts under which the "parochial board had duties and rights, and to no other effect "whatever." The Lord Ordinary sustained the defender's plea now mentioned, and dismissed the action on the general ground above stated. On a reclaiming note, the Court, before answer, superseded consideration of the cause to enable the pursuer, if so advised, to bring a supplementary summons calling the ratepayers in respect of the disputed territory. This was done, and after a voluminous proof, a judgment was pronounced in the Outer House for the defender (*a*).

(*a*) The case was ultimately compromised and withdrawn from Court without a decision by the Inner House.

CHAPTER II.

OF PATRONAGE AND PRESENTATION.

1. The origin and history of Patronage, and the laws which formerly obtained with reference to Patronage and Presentations, are fully explained in Chapters II. and III. of former editions of this work. Only such small part of the matter is here retained as appears to be necessary for an orderly exposition of the recent history of the law.

CHAP. II.
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SECTION I.—*Classification of Benefices in relation to Patronage.*

2. The patron was generally the founder of the church, or his donator or representative, and to him belonged in the general case the right of presentation. The right to present to ecclesiastical benefices belonged, on the one hand, to laymen, and, on the other hand, to churchmen; and suggested the division of patronages into laic and ecclesiastical. Laic patronage, as its name imports, was that belonging to a layman, or to a churchman *qua* individual, or *privato nomine*. Ecclesiastical patronage was that belonging to a churchman in his character as such (*a*). Laic patronages, which were *in dubio* to be presumed, were, with their corresponding rights and privileges, including the *jus presentationis*, commonly acquired by a layman in respect of his having himself built and endowed the church, or from his being in the right of one who had done so (*b*). Ecclesiastical patronages were frequently acquired by churchmen by direct grant from lay patrons. Sometimes churches or chapels were annexed by lay patrons, with the requisite episcopal consent, to cathedral or

Laic and ecclesiastical patronages, what and how acquired.

(*a*) See Forbes, Tithes, p. 58.

(*b*) *Ibid.* p. 65, and *per curiam* in

Earl of Home *v.* The Crown, 1758, 5 Br. Supp. 867, *passim*.

CHAP. II.

Mensal and
common
churches.

Patronate
benefices.

Not of cure
and of cure.

Presentation
without or
with collation.

collegiate churches. By such annexation the church ceased to be patronate, and the right to the revenues of, as well as the *jus præsentandi* to, the church or chapel, were vested either in (1) the bishop, or (2) the corporate body itself for their common behoof. In the former case, the church was styled mensal or patrimonial (*a*): in the latter case, it was styled a common church (*b*).

3. Except mensal or patrimonial and common churches, all churches behoved to have a patron (*c*), and such churches were termed patronate. In patronate benefices to which no cure of souls was attached, as provostries, prebendaries, and chaplainaries, presentation, without collation by the bishop, was sufficient to confer on the presentee the fruits or emoluments of the benefice (*d*). In patronate benefices which were of cure, both presentation by the patron and collation by the bishop were requisite for this purpose, save when, the patronage thereof being ecclesiastical, the patron was also the ordinary, in which case presentation with admission was sufficient: collation being either unnecessary, or constructively implied in the gift of the benefice (*e*). On the other hand, in benefices not patronate, as mensal and common churches, which on this account were also termed free (*f*), collation without presentation was sufficient (*g*).

SECTION II.—*Patron's Right of Presentation after the Reformation.*

Jus præsentationis not
abolished on
Reformation.

4. Although the mode in which the right of presentation had, prior to 1560, been exercised by patrons—arising from the exclusion of all voice on the part of the people in the election of their pastor—was, by some of the Reformers, included among the errors of the Romish Church, yet the right of patronage was not abolished on the establishment

(*a*) Stair, ii. 8, 27; Forbes, Tithes, pp. 35, 74.

(*b*) Forbes, Tithes, p. 36.

(*c*) Stair, ii. 8, 27, 28.

(*d*) Forbes, Tithes, p. 50, § 15; 128, § 1; Lugton v. Edmonston, 1632, M. 9895.

(*e*) Stair, ii. 8, 28; M'Kenzie v. Parishioners of Sclait, 1627, M. 14,785.

(*f*) Stair, ii. 8, 27; Forbes, Tithes, p. 58.

(*g*) Stair, ii. 8, 28.

of Presbyterianism, or indeed materially interfered with for many years thereafter (*a*). On the contrary, the footing on which the leaders of this party desired, and the Government declared, that Presbyterianism should be the religion of the State, was one which reserved entire, in favour of existing patrons of parish churches, the right of presentation hitherto possessed by them (*b*).

5. It is true that in the First Book of Discipline, which was never ratified by the State, the doctrine is enunciated that "it appertaineth to the people, and to every several congregation, to elect their minister." But this doctrine was subsequently repudiated by the Presbyterian party in an address to Queen Mary in 1565, in which the passage quoted in the note occurs (*c*). In conformity with the spirit of this address, the Act 1567, c. 7, was passed, which, after declaring that the examination and admission of ministers was to be only in the power of the Kirk, specially reserved always the presentation of laic patronages "to the just and ancient patrones." By this Act the patron was required to present a qualified person, within six months after the decease of the last incumbent came to his knowledge, to the superintendent of the district, or to a commission appointed by the Church, otherwise the Church was to have the power to confer the benefice.

Doctrine in
First Book of
Discipline.

Reservation of
right in 1567,
c. 7.

6. Although the Second Book of Discipline, which was agreed to in 1578 by the General Assembly of that year, contained a renewed statement of the doctrine of the popular election of ministers, yet this doctrine was again practically negatived by the Act 1579, c. 68, which re-enacted, *inter alia*,

Doctrine in
Second Book of
Discipline.

(*a*) Not until the Act 1649, c. 39.

(*b*) 1592, c. 116.

(*c*) The passage is this: "Our mind is not that Her Majesty or any other patron should be deprived of their just patronages, but we mean, whensoever Her Majesty or any other patron do present any person into a benefice, that the person presented should be tried and examined by the

"judgment of learned men of the
"Church, such as are the present
"superintendents, and as the presenta-
"tion unto the benefice appertains unto
"the patron, so the collation by law
"and reason belongs unto the Church,
"and the Church should not be de-
"frauded of the collation no more than
"the patrons of the presentation," &c.

CHAP. II.

Negatived by
1581, c. 102.

the provisions of the prior Act 1567, c. 7. The doctrine was also distinctly repudiated by the Act 1581, c. 102, which declared that all benefices of cure under prelacies should be presented by the king and the laic patrons. By the Act 1592, c. 116—which is often styled the charter of Presbyterianism—the powers formerly possessed by bishops to collate to benefices were annulled, and it was declared that presentations were henceforth to be directed to Presbyteries with full power to give collation—they being bound, on the other hand, to receive and admit every qualified minister presented by the Crown or laic patron.

Patron's right
to present
recognised by
1592, c. 117.

7. The Act 1592, c. 117, likewise recognised the right of patronage. It ordained the patron, under the penalty of forfeiting his right for that *vice*, to present within six months of the emergence of a vacancy, and in the event of the Presbytery refusing to admit a qualified minister presented by him, authorised him to retain for his own behoof the whole fruits of the benefice. The Act 1606, c. 2, restoring bishops, was followed by the Act 1612, c. 1, which, annulling the Act 1592, c. 116, substituted the bishop of the diocese for the Presbytery. The former enactment, however, was repeated, viz., that on an improper refusal to admit a qualified minister presented by the patron, the latter should be entitled to retain the fruits of the benefice. The right of patronage continued to be recognised after the re-abolition of Episcopacy in 1638, and until the Act 1649, c. 39, passed during the Usurpation, which deprived patrons of their right of presentation, and vested this right, termed the “calling” of ministers, in the congregation. This statute (along with others passed by the Convention of Estates) was in its turn rescinded on the Restoration (*a*); and by the Act 1661, c. 54, and 1662, c. 3, and other statutes, the right of patronage was again authorised or recognised, and laic patronage continued to subsist as formerly until the Act 1690, c. 23.

Act 1612, c. 1.

Patrons de-
prived of the
right by 1649,
c. 39.

Right again re-
cognised.

(*a*) See 1661, cc. 6, 9, 15.

8. On the narrative that the right of presenting ministers to vacant churches, as exercised by patrons, had been greatly abused, the Act 1690, c. 23, annulled and discharged their right to present to any church then vacant, or to become vacant, together with all gifts and infeftments, &c., so far as implying such a right, without prejudice, however—1st, to the right of ministers presented before the date of the Act to their benefices; and, 2nd, the right of Protestant patrons to apply vacant stipends to pious uses within their respective parishes, and that of Popish patrons to do so by appointment of the Presbytery of the bounds. Failing such application of the vacant stipend (a) by the patron, he lost his right to administer stipend during the next vacancy, which, in this event, fell under the sole administration of the Presbytery.

CHAP. II.

Patrons
deprived of
right by 1690,
c. 23.

9. The right of presentation so taken from patrons was primarily transferred to the Protestant heritors and elders of the parish, who, in the first instance, were authorised to propose a clergyman to the congregation. If the person so proposed met with their acceptance, his induction by the Presbytery followed. If he did not meet with their acceptance, the disapprovers were required to give in their reasons of objection, to the effect that the same might be judged and disposed of by the Presbytery by whose authority and decision the calling and entry of a particular minister were effected. Failing an application by the heritors and elders to the Presbytery for the “call and choice” of a minister within six months from the date of the vacancy, the right to present passed, *jure devoluto*, to the Presbytery, who were then entitled to select and ordain a minister to the church, *jure devoluto*. From this devolved right of calling, however, by the heritors and elders was excepted the right of calling ministers to royal burghs having no landward district attached, which right was vested in the magistrates, town-council, and kirk-

Right trans-
ferred to heri-
tors and elders
of parish.

Presentation
by Presbytery
jure devoluto.

(a) Vacant stipends within the Synod of Argyle were exempted from this provision.

CHAP. II.

session of the burgh, as the same existed prior to 1660—the date of the Restoration. When a considerable part of the parish was landward, the “call” was to be by the magistrates, town-council, kirk-session, and the heritors of the parish jointly.

Compensation
money, by
whom and how
payable.

10. In lieu of the right of presentation, of which patrons were thus deprived, the heritors and liferenters of each parish, and the town-councils for burghs, were to pay to the patron, on or before Martinmas 1690, 600 merks (£33 : 6 : 8) on his granting a renunciation of this right in their favour. The payment of this sum (less the amount effeiring to the patron in his capacity of heritor) was apportioned among the heritors and liferenters according to their valued rentals—the former being liable for two-thirds and the latter for one-third of the compensation price actually due. In the case where the Crown was patron of the parish, payment of the 600 merks to the clerk of the treasury operated to dispossess it of the right of presentation. In the case of other patrons, who refused to accept the 600 merks, the amount was to be consigned in the hands of a responsible parishioner, at the risk of the consigner, until the patron granted a renunciation; and in the meantime the right of “call” lay with the heritors and kirk-session. To enforce the mutual rights of parties under the Act diligence was competent, after the said term, at the instance of the patron against the heritors, for payment of the 600 merks, and at the instance of such of their number who were ready to pay, against recusants, as well as against patrons who were unwilling to accept of the said sum.

Act 1690, c. 23,
repealed by 10
Anne, c. 12.

11. The Act 1690, c. 23—which, it will be observed, did not abolish patronage, but only deprived patrons of the necessary right of presentation (*a*)—continued in force until the year 1711, when it was repealed by the 10 Anne, c. 12,

(*a*) See terms of the Act; and per Lord President Craigie in *Earl of Home v. The Crown*, 1758, 5 Br.

Supp. 867; and per Lord Glenlee in *Earl of Hopetoun v. Earl of Rosebery*, 1835, 13 S. at p. 689.

which expressly restored to patrons the right in question, and required Presbyteries to receive and admit such qualified person as the patron might present, in the same manner as such presentee ought to have been admitted before 1690, c. 23. During the comparatively short time that this Act was in operation—a period of about twenty-one years—very few rights of presentation were, in virtue of its provisions, transferred from the patrons to the heritors and kirk-sessions of parishes. It has been observed, and apparently with accuracy, that this occurred in three instances only (*a*). In the case of Strathblane (*b*) it was ruled that he who had a life interest in the patronage of a benefice—the fee being expressly conveyed to another—was not regarded as the patron in the sense of the Act 1690, c. 23, to the effect of enabling him to transfer, or the parish to acquire, on payment to him of the 600 merks, the right of presentation under the statute.

Liferenter.
Case of Strath-
blane.

12. The 10 Anne, c. 12, operated not only to repeal the Act 1690, c. 23, but also to cancel transactions entered into under it, with a view to transfer the right of presentation, which were not formally completed before the passing of the statute of Anne. On a construction of the expressions used in these enactments, it was found that to effect such a transfer it was necessary not only that the 600 merks should have been paid before the date of the 1711 Act, but likewise that the patron prior to that date should have executed a renunciation of his right in favour of the heritors. On this principle of construction of the statutes the case of Cadder was decided (*c*). Here, payment of the 600 merks had been made by the

10 Anne, c. 12,
cancelled
incomplete
transactions
under 1690,
c. 23.

Case of Cadder.

(*a*) Viz.—Cadder, Old Monkland, and New Monkland. See Connell Par. 469, footnote, and Campbell *v.* Stirling, 4th March 1813, F.C. Dunlop Par. 3rd ed. 203, footnote, limits the number to two parishes, excluding Cadder, in respect of the judgment in Cullen *v.* Sprott, 1840, 3 D. 70. The acquisition by this

parish of the right of presentation under 1690, c. 23, was recognised in 1813 in the above case of Campbell *v.* Stirling.

(*b*) Duke of Montrose *v.* Heritors of Strathblane, 1747, Elchies, *Patronage*, 2, and Notes.

(*c*) Cullen *v.* Sprott, 1840, 3 D. 70.

CHAP. II. heritors and liferenters of Cadder to the Principal and Professors of Glasgow University, who, at the date of the Act 1690, c. 23, were the patrons of the parish. No formal renunciation, however, of their right was granted until 1725, being several years after the passing of the Act of Anne, when, on its recital, and on the narrative of payment of the compensation money, the former patrons executed a renunciation and disposition of their right of presentation in favour of the heritors and liferenters. On the occasion of a vacancy in the parish in 1836, it was held, in a competition between two candidates, that the vacancy must be supplied, not by way of election under the Act 1690, c. 23, but by virtue of the right of presentation vested in the Principal and Professors of the College prior to that statute, and conveyed by their disposition in 1725 to the heritors and liferenters. Lord Fullerton dissented, and expressed the opinion that the granting of the renunciation by the patron was contemplated by the Act as preliminary to his receiving the 600 merks, and hence that the receipt of this sum, when proved or admitted, must be held to presume or imply a prior renunciation.

SECTION III.—*Nature of the right of Patronage.*

Patronage and presentation different rights.

13. Although the right of patronage was frequently used synonymously with the right of presentation (*a*), they were nevertheless two separate and distinct rights, which might and sometimes did exist independently of each other. The right of patronage was the superior, that of presentation the subordinate and derivative right. The right of presentation owed its origin to that of patronage, which, however, included various other rights, such as the right of appropriating or applying vacant stipend (*b*); the right of acquiring the

(*a*) As one among many other examples to a like effect, see Bell's Prin. § 836.

(*b*) Under Acts 1592, c. 117; 1661, c. 52; and 1672, c. 20.

teinds not heritably disposed (*a*); the right of administering the benefice by consenting to the granting of tacks (*b*); the right perhaps to a seat in the church, and to a burial-place in the church or churchyard (*c*).

14. By the Canon law the *jus patronatus* was in its origin heritable, and so essentially so, that it was not transmissible apart from the lands with which it was connected. It was likewise by the Canon law reckoned a right of a spiritual nature, the onerous alienation of which was simoniacal and inept; and, on a somewhat similar principle, it was regarded as a subject which could not *per se* be impignorated or adjudged by the patron's creditors (*d*).

Nature of *jus patronatus* by Canon law.

15. By Scots law, on the other hand, patronage in its origin was not a feudal, but a personal right or privilege, which might subsist *per se* as a *jus incorporale*, and might be conveyed by disposition without sasine. This is the doctrine laid down by Stair and Erskine (*e*), and although contrary to that stated by Craig (*f*), it is supported by decision (*g*) and authoritative judicial *dicta* (*h*). At the same time, a right of patronage, although in its original character personal, was quite susceptible of feudalisation; and when once feudalised, the right had thereafter to be held by a feudal tenure (*i*), or at least could not be transmitted without infeftment or its equivalent, to the prejudice of an onerous disponee purchasing the right on the faith of the records (*k*). Hence, in a case where a right of patronage had been

Patronage, though a personal right might be feudalised.

(*a*) Under 1690, c. 23, and 1693, c. 25. *Cochran v. Stoddart*, 1751, M. 9951.

(*b*) Per Lord Kaimes, in *Earl of Home v. The Crown*, 1758, 5 Br. Supp. 867, and per Lord Glenlee in *Earl of Hopetoun v. Earl of Rosebery*, 1835, 13 S. at 689.

(*c*) Ersk. i. 5, 13. But see *infra*, CHAPTER V.

(*d*) Lambertinus, *De Jure Patron.* l. i. pt. ii. quest. 5, art. 7; De Roye, *Proleg. ad tit. de Jure Patron.* c. 36; Van-Espen, *Jus Eccles. Univ.* pt. ii. sec. 3, tit. 8, c. 4, § 15.

(*e*) Stair, ii. 8, 35; Ersk. i. 5, 15.

(*f*) Craig, *Jus Feudale*, l. ii. dieg. 8, § 37.

(*g*) *Parson of Morham v. Laird of Bearford*, 1666, M. 9897.

(*h*) Per Lord Justice-Clerk Hope and Lord Medwyn in *H.M. Advocate v. Graham*, 1844, 7 D. at pp. 189, 198.

(*i*) *Per curiam* in *Earl of Hopetoun v. Earl of Rosebery*, 1835, 13 S. at 690.

(*k*) *Urquhart v. Officers of State*, 1752, M. 9915; and *Elchies, Patronage*, 5, and Notes; *affd.* M. 9923.

CHAP. II.

feudalised, possession thereof, on a title merely personal, did not cause the right to regain its original personal character, and did not constitute an effectual title thereto in the person of the possessor (*a*).

Jus patronatus
as a separate
feudal subject.

16. Although a right of patronage once feudalised was not transferable as a separate subject under a personal title, it was not unusual to dissociate the right from the lands with which it was formerly connected, and to hold or convey the *jus patronatus* as a separate feudal subject (*b*). Patronage was essentially a patrimonial and civil right, the possession and exercise of which might be judicially declared and vindicated (*c*). It was to the fullest extent a subject *in commercio*. As such, it might be made the subject of sale; of excambion (*d*) under the Rosebery and Rutherford Acts; or of security; or of adjudication for debt (*e*); and was carried by the diligence of sequestration.

SECTION IV.—*Nature of the Right of Presentation.*

Right of pre-
sentation,
quid?

17. The *jus præsentationis*, which at an early date became the most characteristic, and was long the most valuable adjunct of the right of patronage, consisted in the right of selecting and nominating a qualified minister as incumbent of a particular parochial charge, who, on collation and induction by the Church Courts, became entitled to enjoy the stipend and temporalities of the benefice. The *jus præsentationis* was eminently a personal faculty (*f*), and

(*a*) Per Lord Medwyn in *H.M. Advocate v. Graham*, *supra*, 7 D. at 198.

(*b*) The symbol formerly used in giving infeftment in an independent feudalised right of patronage was a Bible or Psalm Book, and the keys of the church.—*Ersk. ii. 3, 36*, and *Urquhart v. Officers of State*, *supra*.

(*c*) *Hay v. Presbytery of Duns*, 1749, M. 9911; *Forbes v. M'William*, 1762, M. 9931; *Baillie v. Morrison*, 1822, 1 S. 363 (n.e. 340); *Earl of Kinnoull v. Presbytery of Auchterarder*, 1835, 16 S. 661, *affd. M'L. &*

R. 220. In *Middleton v. Anderson*, 1842, 4 D. at 1006, Lord Mackenzie lays down the proposition as one beyond dispute, viz., that "patronage" was and is a patrimonial or civil "right." See also *Kames' Law Tracts*, p. 223.

(*d*) *Earl of Kinnoull*, 1840, 2 D. 1458; *Earl of Rosebery*, 1852, 15 D. 126.

(*e*) *Officers of State v. Gordon*, 13 Nov. 1821, F.C.; *Grindlay v. Drysdale*, 1833, 11 S. 896.

(*f*) *Grindlay v. Drysdale*, *cit.*, and grounds of judgment as stated by

a mere adjunct of the *jus patronatus* (a); and although the possession by an individual of the former right afforded a strong presumption that he was patron of the parish, such right might be, and frequently was, conveyed and possessed separately from the latter (b).

18. If the right of patronage were vested in two or more persons, the general rule was that they were entitled to exercise the concomitant right of presentation in turns, or, as it was termed, *alternis vicibus* (c). The patronage of a parish might come to be vested in two or more persons simultaneously in a variety of ways, such as by the foundation and endowment of a church jointly by several individuals (d); by grant; by succession; or by the union of parishes.

Right of presentation *alternis vicibus*.

Lord Ordinary Moncreiff in his note, p. 897-8.

(a) Per Lord Glenlee in *Earl of Hopetoun v. Earl of Rosebery*, 1835, 13 S. at 689.

(b) See *Earl of Hopetoun, supra*; *Arbuthnot v. Calderwood*, 19th Jan. 1821, F.C.; *King's Advocate v. Earl of Mansfield*, 1830, 8 S. 765; *H.M. Advocate v. Magistrates of Stirling*, 1846, 8 D. 450, where a right of presentation, to be exercised with the

approbation of the granter, was conveyed to the disponees.

(c) Per Lord Glenlee in *Earl of Hopetoun v. Earl of Rosebery*, 1835, 13 S. at 689.

(d) As, for example, in the case of the erection of certain new parishes under 7 and 8 Vict. c. 44, s. 5, where the patron of the original parish did not undertake to bear the burden of half of the stipend of the minister.

CHAPTER III.

OF THE APPOINTMENT OF MINISTERS BY THE CONGREGATION.

CHAP. III.

Abolition of
right of pre-
sentation in
1874.

1. From 1712 until 1874, the right of presenting ministers to vacant parishes in Scotland was vested in lay patrons. But under the Church Patronage (Scotland) Act, 1874 (37 and 38 Vict. c. 82), this right of presentation was abolished, and the right of electing and appointing ministers was conferred upon the congregation. The leading provision of the Act is embodied in section 3, which is as follows, the parts within brackets having been repealed by the Statute Law Revision Acts (*a*):—

“3. [From and after the commencement of this Act, the said Acts of the tenth year of the reign of Her Majesty Queen Anne, chapter twelve, and the sixth and seventh years of the reign of Her present Majesty, chapter sixty-one, shall be repealed and] the right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers, by means of a committee chosen by the congregation, and of conducting the election, and of making the appointment by the congregation, as may from time to time be framed by the General Assembly of the Church of Scotland, [or which, after the passing of this Act, but before the next meeting of the said General Assembly, may be framed by the Commission of the last General Assembly, duly convened for the purpose of making interim regulations thereanent]: Provided always, that with respect to the admission and settlement of ministers appointed in terms of this Act, nothing herein contained shall affect or prejudice the right of the said Church in the exercise of its undoubted powers to try the qualifications of persons appointed to vacant parishes, and the courts of the said Church are hereby declared to have the right to decide finally

(*a*) 46 and 47 Vict. c. 39, and 56 and 57 Vict. c. 54.

and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof. The ministers appointed, admitted, and settled in terms of this Act are hereby declared to have in all respects the same rights, privileges, and duties which now belong to or are incumbent on the ministers of the said Church."

CHAP. III.

The provisions of the Act apply to the election of an assistant and successor, and also to that of a collegiate minister (section 9).

Assistant and successor and collegiate minister.

2. The section above quoted must be read in connection with the definition of "congregation" in section 9 of the Act:—

Definition of congregation.

"The word 'congregation' shall mean and include communicants, and such other adherents of the church as the kirk-session, under regulations to be framed by the General Assembly, or Commission thereof, as provided in the third section hereof, may determine to be members of the congregation for the purposes of this Act."

Regulations have been framed by the General Assembly, as authorised by section 3, and these will be found in the Appendix. Communicants and adherents are there respectively defined as follows:—

"The electoral roll shall contain, (1) as *communicants*, all persons not being under Church discipline, whose names are upon the communion roll at the date of the occurrence of the vacancy, after it has been corrected (if necessary) by the kirk-session as at that date; as also those who are, and at that date were, parishioners in communion with the Church of Scotland, and have given in certificates within the time intimated, in terms of schedule A (II.), provided such certificates are sustained; (2) as *adherents*, such other persons being parishioners or seat-holders at the date of the occurrence of the vacancy, and not under twenty-one years of age, as have claimed in writing within the time intimated as aforesaid, and in the form of schedule B, to be placed on the electoral roll, and in regard to whom the kirk-session are satisfied that they desire to be permanently connected with the congregation, or are associated with it in its interests and work, and that no reason exists for refusing to admit them to the communion if they should apply. As regards adherents, the decision of the kirk-session shall be final."

3. The right of the Church Courts to decide finally and

CHAP. III.

Power of
Church Courts
to judge of
appointments.

conclusively upon the appointment, admission, and settlement, applies not merely to questions concerning the doctrine and life, and other personal qualifications of the minister-elect, but also to all questions in regard to the conduct of the election, whether as regards any action taken in relation thereto by the minister-elect or his supporters, or as regards other irregularities or mistakes in the conduct of the election. The Church Courts are, in short, the tribunal, with exclusive jurisdiction, to try an election petition arising out of the election of a parish minister by the congregation (*a*).

On the other hand, as pointed out below, the Civil Courts have jurisdiction to determine whether the right of election is still with the congregation, or has passed through lapse of time under the *jus devolutum* to the Presbytery, and generally to determine any question of jurisdiction and to restrain any deviation from the statute.

Jus devolutum. 4. If the congregation fail within six months of the occurrence of a vacancy to elect a minister, the right of election devolves upon the Presbytery. This rule is no new one, but has its origin in the Canon law. A similar rule prevailed in regard to the right of presentation by patrons both before and after the Reformation, although, when the government of the Church was episcopal, it was upon the bishop that the right of presentation devolved (*b*). The matter has been one of statutory regulation from the Reformation downwards, (*c*) but the present rule rests upon the following provision in section 7 of the Act of 1874:—

“If, on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto*.”

5. The effect of this provision has on several occasions

(*a*) See *Stewart v. Presbytery of Paisley*, 1878, 6 R. 178.

(*b*) *Ersk. i. 5, 17.*

(*c*) 1567, c. 7; 1592, c. 117; 1612, c. 1; 10 Anne, c. 12, s. 3; 5 Geo. 1, c. 29, s. 8.

been under judicial consideration. It has been found, as indicated above, that notwithstanding the provisions of section 3, under which the Church Courts have exclusive jurisdiction to judge finally upon appointments, the question whether in any particular case the *jus devolutum* has accrued is one for the civil tribunals to determine (*a*). CHAP. III.
Decisions in regard to the *jus devolutum*.

6. The General Assembly has no power to extend the period of six months by allowing the congregation additional time when, through some miscarriage, a valid election has not timeously taken place (*b*). On the expiry of the six months the right of appointment is vested in the Presbytery as a civil right. Where, however, there has been a miscarriage, owing to mistaken action of the Presbytery, or of the Moderator appointed by them, for which the congregation is not responsible, the congregation are not deprived of the right to appoint by the expiry of the six months from the occurrence of the original vacancy, but are entitled to the time necessary to make an election (*c*). Extension of time.

7. The question, however, which has given rise to most difficulty in connection with the exercise of the *jus devolutum* is the effect in relation thereto of a presentation under the old law, or an election or appointment by the congregation under the new, which, for some reason or another, comes to nothing, and does not lead to the induction of a minister to the vacant charge. The following are the rules which obtained during the period of patronage as stated by Bankton and Erskine :— Where the election proves abortive.

“If the patron acquiesces in the rejection of the presentee by the Presbytery, the residue of the six months that remained at the time the presentation was made commences to run from the time of such refusal, or from the time the appeal is finally discussed, within which he may present another, provided the presentee was an actual minister or licentiate, and declared his

(*a*) *Stewart v. Presbytery of Paisley*, 1878, 6 R. 178. See also *Cassie v. General Assembly*, 1878, 6 R. 221.

(*b*) Per Lord Young and Lord Gifford in case of *Cassie*, *supra*.

(*c*) *M'Farlan v. Presbytery of Cupar*, 1879, 16 S.L.R. 480; *Dunbar v. Presbytery of Abernethy*, 1889, 26 S.L.R. 517.

acceptance or willingness to accept, as likewise he has the residue of the six months in case of the presentee's death happening after the presentation is offered to the Presbytery . . . ; but if the patron presents one who does not accept within six months, or who is not legally qualified as not having taken the oaths required by law or the like, he can, only on the presentee's being rejected, present another within the six months of the vacancy happening (a).

"If the presentee be qualified in terms of the statute, the currency of the six months is suspended by the presentation, during the whole time the Church Courts are employed in deliberating whether to receive him or not; and if they should at last reject him for heterodoxy, or whatever other cause, the patron has as much time left him to present after their sentence as was to run of the six months when the presentation was offered to the Presbytery" (b).

It is thought that these rules were not arbitrary, but were based upon equitable principles, and still obtain under the new system of appointment. It has been suggested (c) that where an appointment has not been sustained by the Church Courts, the six months run on without interruption. The case, however, which is supposed to support this view (d) was very special, and does not seem to go further than to affirm that if the election is irregular, and therefore void, it is no election, and does not interrupt the running of the six months. There does not seem to be any reason why the old rule should be departed from, that when a qualified person is appointed and accepts, and the Church Courts reject him, the running of the six months pauses whilst the case is in dependence before the Church Courts.

(a) Bankton, i. 11, 64.

(b) Ersk. i. 5, 17.

(c) Mair's Digest, 2nd ed. p. 254.

(d) Craig v. Anderson, 1893, 20 R. 941.

CHAPTER IV.

ON ADMISSION OR INDUCTION.

SECTION I.—*Historical Significance of the Ceremony.*

CHAP. IV.

1. It is not within the scope of this work to describe in detail the Presbyterian procedure connected with the settlement of a minister, and admission or induction is here considered only in connection with its aspects and effects in relation to the civil law. For an exposition of ecclesiastical procedure reference may be made to Dr. Mair's *Digest of Church Laws*. The following exposition of the nature of induction under the Canon law, and of the history of the matter in Scotland, is taken from the judgment of the late Lord President Inglis in the case of *Hastie v. M'Murtrie* (a). In so far as it vindicates the accuracy of the use of the term "admission" rather than "induction," under the Presbyterian system it seems conclusive; but in so far as it denies significance to the Presbyterian act, by whatever name it may be called, it must be received with caution, and for the reasons explained at p. 91, the present writer cannot regard it as consonant with Scottish ecclesiastical history.

How far subject is here to be entered into.

2. Lord President Inglis said:—

"What is meant by 'inducting' an ordained minister of a church to an office? Induction is not a *nomen juris*, neither is it a *vox signata* in the existing ecclesiastical law of Scotland. By the Canon law, which was the ecclesiastical law of Scotland prior to the Reformation, induction was the legal name of a ceremony by which, after collation by the bishop of the diocese, some inferior ecclesiastical persons gave the presentee actual and corporal possession of the church and benefice under mandate from the bishop by the use of certain symbols which it is needless to enumerate.

Lord President Inglis upon induction.

(a) 1889, 16 R. 715.

The ceremony was formal and imposing, and necessary to complete the presentee's title to the benefice. During the two comparatively short periods in the seventeenth century, when the National Protestant Church of Scotland was governed by bishops, induction had again a fixed and technical meaning, and was the name of a somewhat similar ceremonial conducted under the authority of the bishop, which consisted in the inferior clergy of the diocese, after collation by the bishop, carrying the collated presentee into the church and placing him in the pulpit, or some other conspicuous part of the church, and there delivering to him the keys of the church. But with the ceremony the name of induction as a *nomen juris* has perished. There is no use of the name in any of the numerous statutes relating to the settlement of ministers under Presbyterian Church government.

"In the earliest of these statutes (1567, c. 7) it is provided, 'that the examination and admission of ministers be only in the 'power of the Kirk.' By the Act of 1592, c. 116, Presbyteries are 'bound and astricted to receive and admitt quhatsumever 'qualified minister presented,' &c. The Act of 1690 simply revived the Act of 1592. By the Act 10 Anne, c. 12, restoring patronage, the Presbytery is 'bound to receive and admit such 'qualified person or persons, minister or ministers, as shall be 'presented.' The Aberdeen Act, 1843 (6 and 7 Vict. c. 61), bears in its title to be an Act respecting the admission of ministers, and by section 3 Presbyteries are directed to 'admit and receive 'into the benefice.' Lastly, in the Act 37 and 38 Vict. c. 82, abolishing patronage and giving the appointment of ministers to congregations, it is enacted (section 3), that 'the Courts of the 'Church are hereby declared to have the right to decide finally 'and conclusively upon the appointment, admission, and settle- 'ment in any church and parish of any person or minister 'thereof.' As to the form of admission to the benefice, the Church Courts are left at perfect liberty to exercise their own discretion. But it is clear that they could not use, and never have used, the old ceremonial of induction.

"It may be true that the name of the old ceremony of induction still lingers in the common speech of the country, and may be used popularly even in the proceedings of the Church Courts as an equivalent of 'admission to a benefice.' It is remarkable, however, that in the earlier authoritative or *quasi*-authoritative Church documents as distinguished from Acts of Parliament, the term 'induction' entirely disappeared. In the First and Second Books of Discipline, in Pardovan's Collections, in Principal Hill's View of the Constitution of the Church of Scotland, 'admission 'of ministers' and not 'induction' is the phrase used. But what is the act of admitting of a minister to a benefice, and what is its effect? There is no *actus sollemnis* apart from ordination.

By the imposition of the hands of the Presbytery the candidate is admitted and set apart to the office of the holy ministry. If he has been already ordained the fact is minuted. What follows is not a ceremony at all, but merely a recognition of the new minister as a member of Presbytery, in his capacity of minister of the benefice to which he has been presented or elected."

CHAP. IV.

3. The statement at the close, notwithstanding the high authority which it claims, cannot be accepted as an adequate view of the significance of "admission to a benefice." Prior to the Reformation, and subsequent to it, during the two episcopal periods, collation and induction were recognised as the ecclesiastical complement of the exercise of the civil right of presentation, and were necessary in order to vest the presentee in the benefice. There is an almost uniform consensus of authority, that "admission" under Presbytery is the equivalent of collation and induction under the Canon law, and has the same effect. In the passage above quoted it is shown that there has been an unbroken recognition of "admission" as a step in the settlement of ministers in statute and text-book (as there has also been in the practice of the Church Courts) from the Reformation downwards. It cannot, it is thought, be accepted that this step is one of trifling significance as above suggested. Many thousands of ministers, who had been previously ordained, and in whose case, therefore, "admission" without ordination was all that was required, have been admitted or inducted by Presbyteries to benefices in Scotland since the Reformation. On no occasion, it is thought, has this been done elsewhere than in the parish and at the church to which the minister was admitted. But if admission be merely the reception and recognition by the minister as a member of Presbytery, in his capacity as minister of the parish, this absolutely unbroken practice, in face of all difficulties of distance, transport, and weather, would be inexplicable. Even in the case of a presentee not previously ordained, there seems no reason for a local cere-

Admission
always recog-
nised as essen-
tial to settle-
ment.

CHAP. IV.

mony if the admission be of the nature indicated. The true view is, it is thought, that which is stated by Erskine (i. 5, 20), that admission is the equivalent of collation and induction, and that the Presbytery "admit the person presented "as minister of the parish, or . . . collate him to the "benefice, after having ordained him a presbyter if he was "not before in Orders. And this *judicial act* of admission "gives to the person admitted a legal title to the benefice"(a).

SECTION II.—*Trial of Presentee by Presbytery.*

Presbytery
bound to
examine
minister-elect.

4. On a valid appointment or election by the congregation being intimated to the Presbytery of the bounds, and sustained by them or by a higher court of the Church, the Presbytery is bound to make examination of the minister-elect, touching his personal capacity or fitness for the office of incumbent of the parish, and if he is found qualified, to admit him into the charge and cure of souls thereof. The individual members of a Presbytery who refuse to do so are liable in damages to the minister-elect, in respect of the civil injury and loss thereby sustained by him (b).

Deliverance
upon the ap-
pointment.

5. Before proceeding, therefore, with the "trials" of the minister-elect, and as a preliminary step in the matter, the Presbytery consider the documents with reference to the election(c) laid before them, and pronounce a deliverance, either refusing to sustain or sustaining the appointment, *i.e.* finding that it is in their opinion valid, and such as, on admission, will confer on the minister-elect a complete right and title to the benefice.

6. If the appointment be sustained by the Presbytery,

(a) The practice which prevailed for many years after 1712, whereby the Assembly found it necessary to send special "riding" commissioners to distant parts of the country to admit ministers in cases where Presbyteries were unwilling to do so, is in accordance with this view of the law. Down to the Disruption

case of Marnoch soldiers were sent at times to protect those engaged in the ceremony of admission. Why? if it were not essential that the ceremony should be local.

(b) *Earl of Kinnoull v. Ferguson*, 1841, 3 D. 778; *affd.* 1842, 1 Bell, 662.

(c) *Mair*, 2nd ed. p. 257.

or if, on review of their judgment refusing to do so, it be found by the higher courts of the Church to be a valid appointment, the Presbytery are bound to take the minister-elect on trial as to his doctrine, life, and literature (*a*), and, if the trials prove satisfactory, to proceed with the settlement. This doctrine is deducible from the judgment in the Auchterarder case just cited, whereby it was decided that the Presbytery was not entitled to refuse to make trial of the qualifications of a presentee on the ground that a majority of the male heads of families, communicants in the parish, without reasons assigned therefor, dissented from or objected to the presentation.

CHAP. IV.

If appointment sustained, Presbytery bound to proceed with trials.

The Auchterarder case.

7. The rule now stated applies not only to the case of an appointment on the occurrence of an actual vacancy in the parish, but also and equally to that of a constructive vacancy arising, leading to the election of an assistant and successor (*b*).

Appointment of assistant and successor.

SECTION III.—*Call and Admission of Minister-elect.*

8. While the law of Scotland prior to 1874 disowned, as “Call,” *quid*? inconsistent with the exercise of the *jus præsentationis*, the right of the selection or appointment by a parochial congregation of an incumbent to the benefice, the form of procedure, adopted by the Church on the occasion of a presentation being made, recognised and sanctioned, as one of the formal steps in the procedure following thereon, a “call” to the presentee on the part of the parishioners, whereby they requested him to become their pastor. This “call,” the origin of which is not perhaps very clear, was sometimes said to constitute — in contradistinction to presentation, which formed the civil title to the benefice—the spiritual title of the presentee to the office of incumbent.

(*a*) Per Lords Brougham and Cottenham in *Earl of Kinnoull v. Presbytery of Auchterarder*, 1838, 16

S. 661; *affd.* 1839, M'L. & R. 220, at pp. 273 and 331.

(*b*) See *Clark v. Stirling*, 1841, 3 D. 722.

CHAP. IV.

First recognition of a "call" in 1649, c. 39.

9. This somewhat fanciful theory, however, is scarcely consistent with the state of the law on the matter, which assumed that a "call" was quite unnecessary to the valid admission of a presentee. The Act 1649, c. 39, appears to contain the first instance of the recognition by law of such a formality. On the Restoration, however, this Act was rescinded, and thereby the "calling" of their pastors by congregations was abolished. The "calling" by the heritors and elders of the parish, authorised by 1690, c. 23, was substituted for, and meant nothing else than, what was equivalent to the presentation by the patron. The subsequent Act 1695, c. 22, prohibited intrusion into vacant churches without "an orderly call from the heritors and eldership of the parish." It can scarcely be doubted, however, that this statute, including the provision in question, was merely supplemental to that of 1690, c. 23, which authorised the purchase by the heritors and elders of parishes of the right of presentation, and along with that Act was repealed by the 10 Anne, c. 12, which recognised neither the necessity nor the propriety of a "call"; and which, by its silence on the subject, plainly treated such a formality as entirely destitute of any importance or virtue in making an effectual presentation.

When call was essential to induction.

10. Save, therefore, in the appointment of ministers to those few parishes which purchased the right of presentation under the Act 1690, c. 23, a "call" could not be regarded as an essential requisite to the admission of a parochial incumbent. Indeed, this remark may be made without any qualification, because in the case of the election of a minister under 1690, c. 23, the "calling" came in place of, and is nothing other or more than a new form of the old "presentation." Accordingly the Act 1693, c. 6, required the oath of allegiance and assurance to be taken "by all heritors voting in the calling of ministers." Apart from this species of "call," law did not enjoin or authorise any. The

Church, indeed, seems practically to have admitted this by the Veto Act, which, passed for the avowed purpose of conferring on congregations the power of *rejecting* the patron's presentee, seemed indirectly to imply that the "call" did not require to be signed by the majority of the congregation, and was therefore of no real efficacy.

CHAP. IV.

Veto Act recognises it as non-essential.

11. Although not enjoined or required by law, or in any way essential to admission (*a*), a "call," or at least a *pro forma* call, was generally, if not invariably, addressed to the presentee, inviting him to become pastor of the church and parish, and promising to him all due subjection in the LORD. The abolition of patronage, and the vesting of the right of election in the congregation, have deprived the call of much even of its ecclesiastical significance. But the call still survives, and it lies for signature for some days, not less than seven, after the election. Its only use is to afford those who voted against the minister-elect an opportunity of falling in harmoniously with the settlement. On the expiry of the time fixed by the Moderator for the signing of the call it is transmitted to the Presbytery.

Survival of call.

12. If no valid objections or reasons against the settlement of the minister-elect be stated and be sustained by the Presbytery, or on appeal by the superior judicatories of the Church, then, at a meeting of Presbytery called for the purpose at the vacant church, the ministerial members of Presbytery present on the occasion invest the presentee (if not yet ordained) with the status of a minister of the gospel by prayer and imposition of hands, and the Presbytery admits him as incumbent of the parish. Thereby he becomes entitled to all the rights and emoluments appertaining to the clergyman of the cure, and to its benefice.

Ordination and admission.

(*a*) See the remarks on this subject by the majority of the Judges in the Court of Session in the Auchterarder Case, *supra*, and in particular by Lords Gillies, Medwyn, and Corehouse, 16 S. 742, 757-8, 766-7. See also Hay v. Presbytery of Dunse, 1749, M.

9911, where it is laid down *per curiam* (p. 9913, top) that they would not take notice of the method of settlement adopted, "whether by "moderation of a call or otherwise, "since that was not prescribed by the "law."

CHAP. IV.

Incumbent's
title, how and
when com-
pleted.

Collation,
quid?

13. Thus, the incumbent's right is effectually conferred and completed by the combined operation of appointment and collation. By appointment, which is the act of the congregation, they nominate a person capable of being received into the benefice, and require the Presbytery of the bounds to admit him accordingly. By collation, which is the act of the Presbytery, that body accepts and approves of the person so appointed, and admits him as minister of the parochial cure. By admission he becomes the incumbent of the parish, and as such entitled (1) to the full status and privileges of a parochial minister, and (2) to the possession and enjoyment of the benefice attached to the cure (a).

SECTION IV.—*Admission of an Assistant and Successor.*

Appointment
to one as assis-
tant and suc-
cessor.

14. It has been already mentioned (b), that on a constructive vacancy occurring by the supervening incapacity of the incumbent, the congregation may, with his consent and that of the Presbytery, elect a suitable person as assistant and successor. Corresponding to the right on the congregation's part to make the election is the duty on the part of the Presbytery to examine, and, if he be found qualified, to admit the minister elected in his character of assistant and successor (c). On admission he is, as regards his clerical functions, in the same situation as the incumbent;—being in the position of a person who has the pastoral office *de præsenti* and in possession, not *de futuro* or in reversion (d).

When principal
incumbent
dies.

15. Hence, on the principal incumbent's failure by death or otherwise, the assistant and successor continues (not commences) to discharge the duties of parish minister, and he thereupon enters on the (hitherto suspended) possession of the fruits of the benefice, without ordination or settlement of new;—his former appointment and admission operating as

(a) See Hope's *Minor Practicks*, p. 99.

(b) See *ante*, p. 85.

(c) *Clark v. Stirling*, 1841, 3 D. 722.

(d) Per Lord Brougham, C., in *Luke v. Magistrates of Edinburgh*, 1832, 6 W. & S. at 265.

an effectual title to the spiritual charge as well as to the civil fruits of the benefice (*a*). On the other hand, notwithstanding the appointment of an assistant and successor to the minister, the latter still remains *the* incumbent of the parish. Accordingly, it has been ruled that a lease to a clergyman "for the full time and space of his incumbency" in a particular parish, does not terminate by the appointment of an assistant and successor to him; and this even although, in terms of an arrangement to this effect on such appointment being made, he was to cease to reside in his parish or perform all clerical functions (*b*).

SECTION V.—*Effect of Admission without or contrary to (formerly) a Presentation or (now) a valid Election.*

16. While right to the status of parish minister, and to the emoluments of the benefice, is conferred and perfected by the act of admission, it is assumed in this statement that such admission is not only in due form, according to the rules of the Church, but is also valid in point of law, *i.e.* granted on a good civil title to the benefice. A valid admission by the Presbytery implies one proceeding on a good title either of election by the congregation or of the exercise of the *jus devolutum* on the part of the Presbytery.

What a valid induction implies.

17. The Presbytery, however, might, prior to 1874, either inadvertently or intentionally have proceeded with and completed the admission of a minister either without, or contrary to, a valid presentation. As the Church Courts under the Act of 1874 have to judge of the validity of appointments, this difficulty could not now arise unless the Presbytery exercised the *jus devolutum* under circumstances where that right had not accrued to them. In considering the effect of such a proceeding, it is important to note the distinction which exists between the spiritual and the civil rights con-

Presentation and induction conferred separate rights.

(*a*) See *Luke v. Magistrates of Edinburgh*, *supra*. (*b*) *Pringle v. M'Lagan*, 1802, Hume, 808.

CHAP. IV.

nected with the status of a parochial incumbent. On the one hand, it is to be kept in view that there is no necessary connection between the possession by an individual of the pastoral office and of the emoluments of the benefice (*a*); and, on the other hand, that while right to the latter was conferred by the patron by the civil title of presentation, and is now conferred by the congregation by election or appointment, right to the former is conferred by the Church Courts by the ceremony of ordination and admission.

No necessary connection between them.

18. Although, therefore, it might be anomalous and unusual, it does not seem to have been regarded as necessarily an impossible condition of matters that an admitted minister might have a good title to the pastoral office, and yet a bad title, *i.e.* no title, to the benefice of the cure (*b*). The one is a civil and the other is a spiritual right; and the admission or non-admission of a minister is a matter cognisable by the Civil as opposed to the Church Courts, only in respect of, and in connection with, a relative civil right, such as (formerly) of patronage (*c*), or to stipend (*d*). This principle was certainly to some extent recognised in our law, and as an instance in which it was jealously guarded and acted on may be mentioned the case of Culross (*e*), where the Court refused as incompetent an application by the patron to stop the ordination by a Presbytery of a minister proposed by the town of Culross, contrary, as he maintained, to his right of presentation. It was the ultimate repudiation by the Courts of this view of the law, to which the earlier cases seemed to point, that led to the Disruption of 1843.

Jurisdiction of Civil Courts *quoad* induction.

Induction must proceed on valid appointment.

19. Consistently with the doctrine now alluded to, *viz.*, that the minister's admission must proceed upon a valid title,

(*a*) See Kames' Law Tracts, vii. p. 233.

(*b*) See Moncrieff *v.* Maxton, 1735, M. 7331 and 9909, and Elchies, *Jurisdiction*, 10, and *Patronage*, 1, and Notes; also per Lord Cringletie, in Macdonell *v.* Gordon, 1828, at 6 S. 606, *passim*.

(*c*) See Baillie *v.* Morrison, 1822, 1 S. 363 (n.e. 340), and Earl of Kinnoull *v.* Presbytery of Auchterarder, *supra*, 16 S. 661.

(*d*) Moncrieff *v.* Maxton, *supra*.

(*e*) Cochran, Petr., 1748, M. 9909, and Elchies, *Patronage*, 3, and Notes.

it was decided that if a Presbytery, contrary to the right of the true patron, admitted a minister not presented by him, the minister acquired no right to the stipend by his admission, but the stipend accruing after, equally as before, such admission was treated and dealt with as vacant stipend (*a*). The cases hitherto referred to are instances of admission by the Presbytery, contrary to the right of presentation on the part of the true patron. But a like result followed on an admission though proceeding on an *ex facie* good presentation if it were really invalid. Thus, when a Presbytery admitted a minister under a presentation which was granted by one who claimed to be, and apparently was, the patron, but whose right to present was afterwards found to be inept, such admission, proceeding as it did on an ineffectual warrant or title, did not confer on the minister, though admitted, a legal right to the fruits of the benefice (*b*). Accordingly, in this case also, the stipend accruing after his admission did not belong to him, but, just as in the former instance, fell to be treated as vacant stipend.

20. The statement in the four preceding paragraphs, Auchterarder case. which, so far as regards the understanding of the law under the system of patronage, is that of Mr. Duncan, must be read, however, along with the decision in the Auchterarder case (*c*), where it was held that the Civil Courts have jurisdiction to compel a Presbytery to take upon trial for ordination and admission the holder of a valid presentation. In this case, and other cases which arose at the time, the Presbytery had not admitted anybody else. Accordingly the question of the effect of such an admission upon the rights of a presentee was not determined.

(*a*) *Moncrieff v. Maxton*, *supra*; *Cochran v. Stoddart*, 1751, M. 9951; and *Elchies*, *Patronage*, 4, and Notes.

(*b*) *Dick v. Carmichael*, 1752, M. 9954, and *Elchies*, *Patronage*, 6, and Notes, as reversed on appeal.—See *Kinnear's Dig.* p. 252, not reported in

House of Lords; *Forbes v. M'William*, 1762, M. 9931.

(*c*) *Kinnoull v. Presbytery of Auchterarder*, 1838, 16 S. 661, *affd.* 1839, M'L. & R. 220; *Kinnoull v. Ferguson*, 1841, 3 D. 777, *affd.* 1842, 1 Bell, 662.

CHAP. IV.

Minister's
liability for
bygones of
stipend.

21. None of the decisions above alluded to deal exclusively with the question regarding the incumbent's liability, if any, to repeat the stipend drawn by him after the date of such a defective admission. This point, which seems to depend on the principle of *bona fide* consumption, would probably be decided in the minister's favour in those instances where no dispute arose or was threatened in the course of his settlement, and where the minister had no cause to suspect any flaw in the title on which his admission proceeded (*a*). A very favourable view in this respect was taken of the minister's right to the benefice in the case of Kirriemuir (*b*). Here it was found, in a competition between a minister whose admission under a presentation was called in question, and another person, to whom the competing patron had gifted the stipend as vacant stipend, that the former was entitled to enjoy the stipend and manse by virtue of his admission, without prejudice to the rights of the rival patrons. No decision, however, was given as to what might have been the result if the patron who had presented should have been found to have had no right to do so.

Bona fides on
minister's part.

(*a*) See per Lord Ordinary Moncreiff *passim* in *Luke v. Magistrates of Edinburgh*, 1832, 10 S. at p. 310; affd. 6 W. & S. 241.

(*b*) *Ogilvie v. Heritors of Kirriemuir*, 1715, M. 9949.

CHAPTER V.

ON CHURCHES.

SECTION I.—*Churches and their Reparation prior to the Reformation.*

CHAP. V.

1. The early parochial division of the country, which practically constituted the inhabitants of each parish a separate ecclesiastical community, was associated with the appropriation to their use of separate ecclesiastical edifices. Besides the motives of piety or ambition which frequently prompted the wealthy to build and endow, during their lives, buildings for public worship, testamentary bequests formed another important source whence funds devoted to these and kindred purposes were derived. After the wealth of the early Christian Church had somewhat increased, the plan of a community of goods was superseded by a system which recognised the appropriation of its revenues according to a fourfold division. One portion was devoted to the support of the bishop; another portion to the maintenance of the inferior clergy; a third to the relief of the poor; and a fourth to the erection and reparation of churches (*a*).

Sources whence churches were originally built and repaired.

2. How long, or with what degree of impartiality, this arrangement was carried out need not here be inquired into; but various causes, of which the growing avarice of the clergy was one, ultimately led to the appropriation by them, as their

Rule of the Canon law.

(*a*) In his treatise on "Ecclesiastical Benefices and Revenues" (p. 17), Father PAUL alludes to this subject, and quotes the decree of Pope Gelasius, contained in a Canon published in the year 494, which is in the following terms:—"Quatuor autem tam de redditu, quam de

"oblacione fidelium, prout cujuslibet
"Ecclesie facultas admittit, sicut
"dudum rationabiliter est decretum,
"convenit fieri portiones, quarum sit
"una Pontificis, altera Clericorum,
"tertia pauperum, quarta fabricis
"applicanda."

CHAP. V.

own property, of those shares of the funds formerly applied to the last two purposes above mentioned. The rule of the Canon law to the effect that no church could be built, or at least consecrated or used as a place of divine service, without the consent of the bishop of the diocese (*a*), generally secured the existence of an ample endowment fund, not merely for the support of the incumbent, but also for the maintenance of the fabric. This fund embraced the teinds of the lands annexed to the church as the benefice of the cure. Hence, the expense of repairing churches came to be regarded as a legitimate burden on the endowment fund, and the duty of executing the necessary repairs as an obligation devolving, in part at least, on that portion of this fund which was payable directly to the incumbent.

Liability there-
by imposed on
the incumbent
or the titular,
and on the
parishioners.

3. The extent of the incumbent's liability might, in particular cases, be dependent on the will of the founder and the terms of his grant; but, apart from specialties, the Canon law recognised, if it did not always enforce, this not inequitable rule, that he who was in the enjoyment or possession of the benefice attached to the church should contribute toward its reparation (*b*). As expressed in the passage cited below, this principle did not, on the one hand, necessarily impose liability on the incumbent if merely a stipendiary, such as a vicar; nor, on the other hand, was it necessarily confined in its application to the incumbent only, but it might be applicable to one who, although not charged with the cure of souls, was, *qua* titular, in right of the benefice attached to the church (*c*). If not in all cases, at least in those where the proportion of the endowment fund specially devoted to

(*a*) Lambertinus de Jure Patron. b. i. pt. i. quest. 2, art. 3, § 3, and art. 18, §§ 1 and 2. See also Canons 6 and 7 of the Canons of the Church of Scotland, quoted in Hailes' "Annals of Scotland," 3rd ed. vol. iii. p. 169.

(*b*) "Habentes beneficium in ecclesia tenentur contribuere ad ipsius reparationem. Quicumque ecclesi-

"asticum beneficium habent, omnino
"adjuvent ad tecta ecclesie restaur-
"anda, vel ipsas ecclesias emendan-
"das."—Decret. Gregor. lib. iii. tit. 48.

(*c*) That this was so, is assumed by Lord Craigie in *Shaw v. Forbes*, 1827, 5 S. 761 (n.e. 711).

the maintenance of the fabric of the building was inadequate for the purpose, those for whose use and accommodation it was destined, viz., the parishioners, seem also to have been required to contribute toward this object. As deducible from some of the early decisions, from judicial and other *dicta*, and from the terms of the Act of Privy Council now to be mentioned, it appears that by the Canon law in force in Scotland prior to the Reformation, the duty of keeping in repair that part of the church which consisted of the chancel or choir devolved on the parson, or the person in right of the teinds, while the burden of maintaining the rest of the building, in the absence of a special adequate fund for this purpose, was imposed on the parishioners (a).

SECTION II.—*Changes in the Patrimonial Rights of Churchmen on the Reformation.*

4. Such seems to have been the state of the law at the date of the Reformation. This event, however, introduced radical changes at once in the ownership of ecclesiastical property, and in the rights of incumbents to the civil fruits of their benefices. Not merely was the Church despoiled to a great extent of its extensive patrimonial possessions, but the new order of clergy generally were likewise deprived of what they, not unnaturally, regarded as inalienably their own, viz., the teinds. As a general rule, parish ministers were, from 1560 to 1617, supported out of the "thirds" of ecclesiastical benefices.

Stipends payable out of "thirds," from 1560 to 1617.

5. From 1617 the provisions in their favour, though payable out of, formed merely a burden on, the teinds of their parishes, save in the case of those incumbents, styled parsons, who, *qua* titulars, drew the whole teinds of the parish. The Acts 1690, c. 23, and 1693, c. 25, however, which vested in the patron the whole teinds of the parish not heritably

From 1617 burden on teinds.

(a) See *per curiam* in *Swinton v. Wedderburn*, 1663, M. 8499; Balfours Practicks, p. 35, Dunlop, p. 4, and Mack. Obs. on Act 1572, c. 54, 185.

CHAP. V.

disposed, burdened with a provision to the minister, deprived the clergymen of their rights of titularity. Thus, after 1560 there existed no special funds devoted to the maintenance of churches. From that date down to 1690 there were comparatively few parsons; and after 1693 there were none at all. The change effected in these respects necessitated a change, to some extent at least, in the source whence the cost of repairing and upholding churches was to be defrayed. This change, however, as will be seen, did not so much consist in the introduction of any new rules of liability on this subject, as in the altered application of those rules which already existed.

SECTION III.—*Provisions as to maintaining Churches passed on the Reformation.*

Act of Secret
Council of
1563.

6. In virtue of powers conferred on them to this effect by the Statute 1563, c. 76, the Lords of Secret Council passed an Act, dated 13th September 1563 (*a*), whereby, on the narrative that through the sloth and negligence of the parishioners, and the failure of parsons doing what appertains to them in upholding parish churches, these buildings daily decay and become ruinous, the Lords ordain them to be repaired, and thereafter maintained and upholden, upon the expenses of the parishioners, and parson, in the proportion of two parts, and one part, of the expense respectively. The former were to be charged to tax themselves, according to their substance for said two parts of the expense. As regards the parson's share, the Act provides that "the said messengers pass and sequesterate the fruits, teinds, and profits of the said parishes, so far as may extend to the parson's part of the same, to remain in the parishioners' hands" until his share of the expense was paid to the collectors (*b*).

(*a*) This Act, of which the substance is given in the text, is printed at length in *Boswell v. Duke of Portland*, 1834, 13 S. at p. 158, and in the Ap-

pendix to the Supplement to Connell on Par. Law, p. 114.

(*b*) This provision in the Act (as well as the Act generally) is but

7. This Act not having taken effect, that of 1572, c. 54, CHAP. V.
Act 1572, c. 54. was passed, which provides, that when the "parochiners," after requirement to this effect, neglected to appoint stentmasters, the "Archbishop, bishop, superintendent, or commissioner of the kirkes" should do so, and should also dispose of complaints made to them against "certain particular persones" (a) who have applied to their own use the materials of ruinous parish churches. Although this statute does not contain any special provision imposing liability on the parson for any part of the expense of repairing the building, the continued existence of such liability must be assumed to have been recognised.

8. The term "parochiners," as used in this statute and in the Act of Privy Council, has been interpreted to mean, not "Parochiners" mean "heritors." the inhabitants generally of the parish, but such of them distinctively as possessed landed property therein situated, *i.e.* the heritors (b). The expressions contained in the Act of Privy Council are consistent with this view, inasmuch as it directs the stent to be levied by way of a property and not of a capitation tax (c); and although the term "substance" there used, effeiring to which the "parochiners" were to be assessed, is quite susceptible of a wider application, the early cases of Lauder (d) in 1630, and of Kirkcaldy in 1685 (e),

declaratory of what the law on the subject previously was, as appears from the judgment in *N. v. Parishioners of Aytoun*, in 1540 and 1558, where it was found that "the teindis and dewteis of the parochin may be sequestrat and arrestit be the authoritie of ane Judge Ordinar, in the parochineris or tenentis handis, unto the tyme the prelate or persoun repair and reparrell the Kirk swa far as concernis his part."—See Balfour's Practicks, p. 35, where this case is reported.

(a) This term evidently means "parsons."

(b) In the *Feuars v. Heritors of Crieff*, 1781, M. 7924, Lord Monboddo remarks, 2 Hailes, p. 893,

"From the days of Alexander II. to 1563, the expense was laid on the parishioners; afterwards it came to be laid on the heritors."

(c) Thus, in the Kirk-Session of Lauder v. Goodman of Gallowshiels, 1630, M. 7913, the stent was imposed on the parishioners proportionally to the lands possessed by them in the parish.

(d) *Ibid.*

(e) *Williamson v. Parishioners of Kirkcaldy*, 1685, M. 7914. Here, in the case of a burghal-landward parish, the Court found that the "heritors of the acres" in the landward district were liable proportionally for the repair of the church.

CHAP. V.

show that the burden was from the first imposed upon heritable as opposed to moveable property. In these days land was the only important source of wealth, and there was an obvious convenience in assessing it alone. This construction of the phrase "parochiners" has ever since been adopted (*a*), and, consistently therewith, the doctrine is now firmly established, that it is on those persons, and those persons only, who fall within the category of "heritors" that the burden of maintaining parish churches, under the enactments just mentioned, is imposed.

SECTION IV.—*Former liability of Parsons in the Reparation of Parish Churches.*

How the incumbent's liability to repair the church has ceased.

9. The obligation imposed on parsons by the Act of Privy Council of 1563 to defray, in part, the cost of repairing the church, which the statute of 1572, c. 54, constructively ratified, was, as the terms of the Act itself bear, but the recognition of a liability already attaching by law to this order of the clergy. Such liability, it is true, no longer exists, but its non-existence at the present day is attributable, not to a repeal of any of the provisions contained in either of these enactments, but, as already observed, to the operation of the Acts 1690, c. 23, and 1693, c. 25, whereby the order of "parsons" was practically extinguished. For a long period, however, after the Reformation, the parson's liability to contribute to the repair of the church was recognised and enforced, and indeed, down to within a few years prior to the Act 1690, c. 23, the principle upon which this obligation truly rested is recognised by decision (*b*).

Chancel reckoned one-third of the church.

10. From the state of decay into which churches generally had fallen at or shortly after the Reformation, the chancel or choir, being that part of the building which the parson

(*a*) See per Lord Craigie in *Shaw v. Forbes*, 1827, 5 S. at p. 763 *passim*, and *per curiam* in *Boswell v. Duke of Portland*, 1834, 13 S. 153. See

also *Ersk. ii.* 10, 63, and *Mack. Obs.* on Act 1572, c. 54, at p. 185.

(*b*) *Williamson v. Parishioners of Kirkcaldy*, *supra*.

was bound to keep in repair, was frequently undistinguishable from the rest of the building. To escape from the dilemma which this state of matters involved, the practice was introduced, at an early period, of reckoning the chancel at about one-third of the structure. Agreeably to this rule, where either there was no chancel, or it could not be readily identified, the parson was stented in one-third, and the heritors in two-third, parts of the cost of the required repairs, irrespective of the particular parts of the building on which they were actually executed (*a*).

11. The footing on which, under the Canon law, liability was imposed on the parson to repair part of the church, was, as already mentioned, in respect of his being in right of the fruits of the benefice, and correspondingly liable in the burdens thereto attached (*b*), among which the reparation of the chancel of the church was included. The recognition of a similar principle is traceable in the decisions on the subject after the Reformation. These decisions indicate that the ground of liability was rested on the fact of ownership in or right to the fruits of the benefice, or the teinds of the parish. Thus, in *Shaw v. Countess of Winton* (*c*), and *Kirk of Selkirk v. Stewart* (*d*), the Court found that the parson or his tacksman was liable in the repair of the choir, where there was one, or, if there was none, in payment of one-third of the stent for repairing the entire church. In the case of *Kirkcaldy* (*e*), which was decided a few years before the Act 1690, c. 23, the Court held that, in the case of landward parishes, the teinds were liable for the repair of the choir; and the argument for the pursuer in the case of *Selkirk* (*f*),

Ground of the parson's liability.

(*a*) See *Shaw v. Countess of Winton*, 1623, M. 7913; *Kirk of Selkirk v. Stuart*, 1628, *ibid*.

(*b*) See Decret. Gregor. lib. iii. tit. 48, *supra*, p. 102, with the commentary thereon, which is in these terms: "Nam ubi est emolumentum ibi debet esse onus; quia non est ferendus is qui lucrum amplectitur onus autem subire recusat." See also *N. v. Par-*

ishioners of Aytoun in 1540 and 1558, *supra*, p. 105, which was decided several years before the Act of Privy Council.

(*c*) 1623, M. 7913.

(*d*) 1628, M. 7913.

(*e*) *Williamson v. Parishioners of Kirkcaldy*, 1685, M. 7914.

(*f*) *Heritors of Selkirk v. Duke of Roxburghe*, 1738, M. 7915, and

CHAP. V.

On abolition of
parsonages,
liability trans-
ferred to
heritors.

in 1738, proceeds upon this as a well-recognised principle. By the Acts 1690, c. 23, and 1693, c. 25, those ministers who were parsons at these dates respectively ceased to be so, the teinds of the parishes which, as beneficed incumbents, they had formerly drawn being transferred to the patrons, who thereupon became the titulars. Neither the Act of Privy Council, nor the statute 1572, c. 54, however, imposed any liability on titulars for “uphalding” or “reparrelling” churches. Consequently, on the extinction of the order of “parsons,” the share of this burden formerly allotted to them was added to that borne by the “heritors.” In this position the law in the matter still remains.

SECTION V.—*Obligation to provide and maintain Churches, what, and on whom imposed.*

Providing and
maintaining
churches,
quid?

12. The structural operations connected with the existence of parish churches embrace their original erection, their conservation, and their renewal—the relative legal obligations being summarised in these two comprehensive terms, viz., “providing and maintaining” churches. At the time of the Reformation in Scotland parish churches existed throughout the country. It was therefore unnecessary, as at that date, to make special provision for the *erection* of ecclesiastical buildings in connection with the reformed religion. Accordingly, the Act of Privy Council in 1563, and the statute 1572, c. 54, presuppose the existence of churches in each parish, and their provisions are confined to “uphalding” and “reparrelling” them. At the period in question, the number of churches throughout the country, as compared with the amount of ecclesiastical provision for their proper endowment, seems to have been somewhat excessive; for the Act 1617, c. 3, empowered the Commissioners thereby appointed

Scope of Act of
Privy Council
in 1563, and
Act 1572, c. 54.

Elchies, *Kirk*, and Notes. Although this case did not occur until after 1693, it does not on this account the

less support the remarks in the text. See also per Lord Craigie in *Shaw v. Forbes*, 1827, 5 S. at p. 763.

to unite churches, with the express view of thus providing a more adequate stipend to different parish clergymen.

13. Numerous Parliamentary Commissions were appointed, ending with the permanent Commission under 1707, c. 9, on which powers were conferred to disjoin, unite, annex, and erect parishes and churches (*a*). The statute just mentioned declared that these operations should be effected in conformity with the rules laid down, and powers conferred by the Acts 1663, c. 19, 1690, c. 23 and c. 30, and 1693, c. 23. On examining these statutes, it will be found that, while they confer ample powers on the Commissioners appointed under them to deal with the several matters to which they relate, these Acts do not contain very specific rules as to the procedure to be adopted in the special case of the erection of a new church, neither do they declare by whom, or at whose expense, the church is to be built. It has been already remarked, that the term "kirk," occurring in the Acts now alluded to, seems frequently used synonymously with "parish." Hence the word "erect," when in conjunction with that of "kirk," may be, and probably frequently is, used in a parochial and not in a structural sense. The language of the Act 1621, c. 5, however, seems to imply that the Commissioners under it might, when necessity or conveniency required, appoint new churches to be built in parishes, with the consent of the patrons, tacksmen, and others having interest.

Scope of the
various
Parliamentary
Commissions.

14. The Act 1661, c. 61, likewise very distinctly empowers the Commissioners to "build and erect new kirks." To what extent these Parliamentary Commissioners exercised this special authority committed to them does not very clearly appear. The building of a church in a parish where no church previously existed, *i.e.* the building of a new as opposed to the rebuilding of an old church, would be called

How far
churches
erected under
their authority.

(*a*) For a short statement in regard to these Commissions see *ante*, p. 16 *et seq.*

CHAP. V.

for only in the event of the creation of a new parish—as opposed to the mere disjunction and erection *de novo* of parishes which had formerly been united. It seems reasonably probable that prior to the Act 1707, c. 9, the circumstances of the country were not such as demanded any considerable increase to be made in the number of parish churches, or of buildings which, by a modification in parochial boundaries, might be “erected” into parish churches.

When a church
is to be
provided

15. The erection of a church where no church formerly existed—*i.e.* providing a church—usually, if not invariably, occurs only on the occasion of the creation of a new parish either *quoad omnia* or *quoad sacra*. As a condition of the disjunction of lands from one parish, and their erection into a new parish *quoad omnia*, under 1707, c. 9, as altered and amended by 7 and 8 Vict. c. 44, the consent of the heritors of a major part of the valuation of the parish is requisite (*a*). When a church has been already built before disjunction and erection, the parties by whose order it was built will be liable in the cost of the building, *ex contractu*. Where a church is not already built, the Act of Victoria seems plainly to assume that the obligation and expense of building a church will devolve on the heritors (*b*); and it further seems quite within the power of the Court to refuse to pronounce a decree, erecting the proposed district into a parish, except on such a footing as implies that a sufficient church for the use of the parish will be built, either by the heritors, or by those applying for the parochial erection.

Providing
church in
parish *quoad
sacra*.

16. To the disjunction of lands and their erection into a new parish *quoad sacra*, it is made a condition that a church either has been built or acquired, or shall be built or acquired, at the expense of the promoters of the measure (*c*). In the disjunction and erection of parliamentary districts into

(*a*) See 7 and 8 Vict. c. 44, s. 1.

(*c*) *Ibid.* s. 8.

(*b*) *Ibid.* s. 4.

parishes, whether *quoad sacra* or *quoad omnia*, it is assumed that churches do already exist (*a*). As "providing" a new church, when this is required, forms part of and is auxiliary to the erection of a new parish, the reader is referred for information on the subject (*b*) to the procedure adopted in effecting the latter measure.

17. Under the term "maintain," as herein used, are included those structural operations which, after a church has been erected, are or may be necessary to secure for the parishioners suitable accommodation within it. These operations include repairing, enlarging, and rebuilding the church. As already remarked, the obligations in question devolve on the "parishioners," *i.e.* on the "heritors" of the parish. The origin of, and the various meanings attachable to, this term are elsewhere adverted to (*c*). In connection with the present subject, the term may be described as indicative generally of all persons who are possessed of the *dominium utile* of heritable subjects, whether holding blench or feu (*d*), and it embraces not only the owners of lands and heritages (whether individuals or corporate bodies) situated in country parishes, but likewise the proprietors of houses and buildings in a burgh (*e*), or in a town, or even in a large village (*f*), forming the urban district of a parish. Feudal title is not essential, and the owner of a beneficial interest in land such as aqueduct is a heritor, and as such liable in assessment (*g*). The term is also applied to corporate bodies, such as railways (*h*), or to the incorporations of a burgh *qua* proprietors (*i*)

Operations included under the term "maintain."

"Heritors," who included under the term.

(*a*) See 7 and 8 Vict. c. 44, ss. 14 and 15.

(*b*) See *ante*, p. 24 *et seq.*

(*c*) See *post*, CHAPTER XII.

(*d*) See per Lord President Hope in *Boswell v. Hamilton*, 1837, 15 S. at p. 1150.

(*e*) In this sense the expression "heritors within the burgh" is applied in *Farie v. Leitch*, 2nd Feb. 1813, F.C., to signify, *inter alios*, owners of property, and indeed even residents, within the burgh of Rutherglen.

(*f*) Thus Lord Gillies designated

the feuars of the town or village of Mauchline as "heritors" in *Boswell v. Hamilton*, *supra*, 15 S. 1149.

(*g*) *Hay v. Edinburgh Water Company*, 1850, 12 D. 1240, affd. 1 Macq. 682; *Strathblane Heritors v. Corporation of Glasgow*, 1899, 1 F. 523, affd. 2 F. (H.L.) 25.

(*h*) See *Macfarlane v. Monklands Railway Company*, 1864, 2 M'P. 519, and *Scottish N.-E. Railway Company v. Gardiner*, *ibid.* 537, and per Lord Kinloch, p. 549, foot.

(*i*) In this sense the term was also used in *Farie v. Leitch*, *supra*.

CHAP. V.

Who not
included.

of burghal property, and to the magistrates of a royal burgh as representing the body corporate (*a*).

18. On the other hand, those who are possessed of the *dominium directum* only of heritable property come not within the category of "heritors." Hence superiors are exempt from the obligations in question (*b*). Nor is a titular a heritor; consequently, no liability attaches to him for the expense of maintaining the church (*c*). In one instance, indeed—viz., in the case of Selkirk in 1738—a titular was assessed for the repairs on a church, conform to his valuation. But it is clear, from the pleadings in the cause, that the judgment pronounced was one of consent, and it is therefore of no authority (*d*). A patron is not a heritor; and therefore, *qua* patron, is not liable to maintain the church (*e*). Liferenters are not heritors, and are not liable in the expense of maintaining churches, either directly or by way of relief, to the fiar of the lands liferented (*f*). For a similar reason, tenants are exempt from the burden in question, and this not only when they are occupants of the subjects under an ordinary or short lease, but even when under one which, from its duration, renders them practically, and to some effects legally, owners of the property (*g*).

(*a*) See *M'Neel v. Robertson*, 1836, 14 S. 849; *Magistrates of Elgin v. Galherer*, 1841, 4 D. 25.

(*b*) This doctrine was applied in *Dundas v. Nicolson*, 1778, M. 8511, to exempt the superior from liability in the expense of a *manse*.

(*c*) See per Lord Craigie in *Shaw v. Forbes*, 1827, 5 S. 763, *affd.* 4 W. & S. 300; and per Lord Justice-Clerk Hope in *Reid v. Commissioners of Woods*, 1850, 12 D. at 1214, who there says: "The titular cannot be, in any event, subjected to the expense of upholding the fabric of the church."

(*d*) *Heritors of Selkirk v. Duke of Roxburghe*, 1738, M. 7915. From the Session papers it appears that the object of this action on the part of the heritors was virtually to review a judgment dated 1st July 1628, which had been pronounced on the sugges-

tion, or at least with the express consent, of the then Duke, and without any debate, finding him liable in the expense of repairing the church, conform to the valuation of his teinds as entered in the cess-books.—See *Arniston Coll. Sess. papers*, vol. xii. No. 12, pp. 2 and 14. The judgment in 1738 was but a repetition of the former one, and the defender did not decline to pay according to this rule.

(*e*) See *Mack. Obs. on Act 1572*, c. 54, p. 185.

(*f*) *Anstruther v. Anstruther's Tutors*, 1823, 2 Br. Syn. 1191, and 2 S. 306 (*n.e.* 269).

(*g*) See *M'Laren v. Clyde Trs. and M'Laren v. Harvey*, 1865, 4 M.P. 58, and per Lord Neaves, p. 63, foot and over. *Traquair v. Heritors of Innerleithen*, 1870, 9 M.P. 234.

SECTION VI.—*Nature of the obligation to maintain Churches.* CHAP. V.

19. While the provisions contained in the Act of Privy Council of 1563 and the statute 1572, c. 54, are, in a great measure, merely declaratory of the law relative to the repairing and “upbigging” of churches which existed at the date of the Reformation, yet, as the Canon law is not received by us as of direct authority, the obligation devolving on heritors to maintain churches is truly statutory in its nature, and not attributable to the rules of common law.

20. The execution of the repairs required from time to time on a parish church in order to maintain it in a sufficient condition, although not a burden which recurs at stated or regular periods, is nevertheless one which is necessarily permanent in its nature. On this footing the obligation to maintain churches is regarded and dealt with; and it is imposed in respect of the ownership of heritable property, which yields, or is capable of yielding, a permanent income or revenue, as opposed to a casual return or profit, derived not from the fruits or produce of the subject, but from a disposal of part of the subject itself, *e.g.* money obtained from the sale of minerals. On this principle, in the case of Inveresk (*a*), it was ruled that no part of the expense of rebuilding the church was assessable on the owner of coal-mines in the parish, *qua* proprietor thereof—the profit derived by him from these mines being of the nature of casual profit as opposed to permanent rent.

21. On the principle of the judgment in the case of Kinross (*b*), applicable to manse assessment, the obligation to contribute toward the maintenance of the church is not a “public burden,” but is an inherent qualification of proprietary right. This obligation on the part of the heritor seems to result from his character as landowner within the parish, and not from his character as seatholder within the church.

(*a*) *Bell v. Wemyss*, 1805, M. *Kirk*, Appx. 3.

(*b*) *Bruce-Carstairs v. Greig*, 1773, M. 2333, *affd.* M. 2335.

CHAP. V.

Is it dependent
on occupancy
of church?

Case of Kirk-
caldy.

Monzie.

This is in accordance with the express provisions in the Act of Privy Council of 1563, and the statute 1572, c. 54, which impose the stent on the "parochiners," *i.e.* as construed, the "heritors," irrespective of their occupancy of the church. So far as regards purely landward *quoad omnia* parishes, this principle has been distinctly recognised (*a*), and does not seem to have ever been contradicted. In the case of Kirkcaldy (*b*), which was that of a burghal-landward parish, the judgment of the Court appears to countenance the view that in such a parish a heritor's liability to repair the church may, to a certain extent, be dependent on his ownership of sittings, and may be got rid of by disposing of the same, but this view is contrary to principle, and the case cannot be regarded as authoritative.

22. Again, in the case of Monzie (*c*), which was that of an annexation *quoad sacra* in 1702, the Court held that the heritors of the lands annexed were liable in the burden of upholding the fabric of the church to which these lands were annexed *quoad sacra*, and that they were not liable to contribute to uphold the church from which they were disjoined: the theory of this judgment apparently being to connect the obligation to repair the church with the right of occupying it. Lord Deas explained in the Roxburgh case (*d*), that this decision proceeded upon the ground that the heritors had made themselves liable by attending the

(*a*) It is so in the Lord Ordinary's interlocutor of 14th Jan. 1812, in *Farie v. Leitch*, 2nd Feb. 1813, F.C. See particularly the 6th and 7th findings.

(*b*) *Williamson v. Parishioners of Kirkcaldy*, 1685, M. 7914. Here the Court found that "the heritors of the acres and country or landward parish were liable proportionally for reparation of the body of the church, *unless they would quit their seats*."

(*c*) *Drummond v. Heritors of Monzie*, 1773, M. 7920. "While the pleas of prescriptive and uninter-rupted possession, by the pursuer

"and the Duke of Athole, of seats in the churches of Monidie and Monzie respectively, were strenuously maintained, it appears," says Mr. Duncan, "from the Judges' notes on the Session papers, that the Court did not proceed on this specialty, but upon an assumed general doctrine of law.—See Campbell's Coll. vol. xxii. No. 60." But Lord Deas, as pointed out *infra*, on an examination of the pleadings, was of opinion that the case turned upon specialties.

(*d*) Per Lord Deas, in *Roxburgh*, 1876, 3 R. 728, at 741; reversed 4 R. (H.L.) 76.

church for the prescriptive period and intermeddling with the fabric. The discussion of this question in the Roxburgh case, and also in the Duddingston case (*a*), is inconclusive and unsatisfactory, but it is thought that whilst special equities may arise from the actings of parties in special circumstances, as a general rule the right to sittings and the obligation to build or repair are in no way correlative. Lands erected into a parish *quoad sacra* remain liable for ecclesiastical burdens in their former parish (*b*). Fortrose.

SECTION VII.—*Obligation to maintain Churches, how implemented.*

23. The terms of the Act of Privy Council of 1563 (*c*) imply that if the parishioners delayed to proceed with the repair and “upbigging” of ruinous churches, they were to be charged to elect qualified persons to tax them for the cost of the requisite operations, and to make payment of their respective shares to the kirk-masters or deacons of the parish. Referring to this Act, that of 1572, c. 54, provided that when the parishioners, on being required so to do, neglected to elect persons to tax them, or when there was no kirk-master appointed, the “archbishop, bishop, superintendent, or commissioner of the kirks” should, at their discretion, appoint persons in each parish for making and receiving the taxation; and in the event of the persons so elected refusing to act, should give decree in the premises, enforceable by letters of horning and poinding, to be granted on their application by the Court of Session (*d*). Provisions of the Act of Privy Council and Act 1572, c. 54.

24. While the phraseology in these enactments is somewhat obscure, their provisions seem to imply that the heritors of the parish were at once authorised and required to initiate proceedings themselves in the matters alluded to; and that it was on, but only on, their refusal or failure so to do, that Import of these Acts.

(*a*) Duke of Abercorn *v.* Presbytery of Edinburgh, 1870, 8 M.P. 733.

(*b*) Magistrates of Fortrose *v.* MacLennan, 1880, 8 R. 124.

(*c*) *Supra*, p. 104.

(*d*) See Mack. Obs. on 1572, c. 54, p. 185.

CHAP. V.

Assumption of
jurisdiction by
Presbyteries.

the jurisdiction conferred on the bishops came into operation. Presbyteries seem to have, without objection or question, assumed and exercised a similar jurisdiction during the temporary suppression and on the final abolition of Episcopacy. An early instance to this effect occurs in the case of Lauder in 1630 (*a*), where the Presbytery of Ettleston ordained the heritors to convene and take proceedings with a view to repair the church. Under this deliverance the heritors met and imposed a stent on themselves, which one of their number attempted, but without success, to suspend.

Their right
challenged in
the case of
Dunning, but
now finally
fixed.

25. The right of the Presbytery to interfere in this matter seems never to have been called in question (*b*) until the case of Dunning in 1807 (*c*), where a suspension was brought by the heritors of the Presbytery's deliverance, ordaining the church to be enlarged or rebuilt. On review of the Lord Ordinary's judgment sustaining this deliverance, a doubt was started from the Bench as to the Presbytery's jurisdiction; but after a written argument on the subject this doubt was unanimously repelled as unfounded, and on this footing judgment was pronounced. The doctrine thus given effect to has never since been successfully disputed (*d*), and, notwithstanding the reported judicial *dictum* in the earlier case of Wick (*e*), may now be regarded as conclusively established.

Nature of
right.

26. Under the Act of Privy Council of 1563, and the statute 1572, c. 54, the duty of executing the requisite repairs, and the right to do so, devolved in the first instance on the parishioners, and the interference of the bishop was only called into play in the event of their neglect or refusal. The

(*a*) Kirk-Session of Lauder *v.* Goodman of Gallowshiells, 1630, M. 7913.

(*b*) This is admitted, or, at least, assumed in the two earlier and very important cases of Tingwall, 1787, M. 7928, and Harlow *v.* Merchant Maiden Hospital, 1802, 4 Paton, 356, not reported in Court of Session.

(*c*) Minister *v.* Heritors of Dunning, 1807, M. Kirk, Appx. 4.

(*d*) This case of Dunning is relied

on as a conclusive decision on the point by Lord Robertson in Campbell, 19th May 1815, F.C.

(*e*) Dunbar, 29th June 1804, F.C. Here, as the reported states, "Several of the Judges gave it as their opinion that the Presbytery, except from tolerance, have no jurisdiction whatever in the building of churches; the application in such a case should be made to the Judge Ordinary."

jurisdiction of Presbyteries stands in a similar position. The body of heritors are quite entitled, without the interference of the Presbytery, to decide to execute, and to commence and complete, any or all of the operations required to keep or put the church in a thorough state of repair, and render it suitable for the accommodation of the parish. It is only in the event of the heritors refusing or unduly delaying to do so that the Presbytery's right to take action in the matter emerges. This doctrine, which is supported by various judicial decisions and *dicta*, is elsewhere fully explained (*a*).

SECTION VIII.—*When obligation to repair the Church emerges.*

27. A parish church is deemed to be in a state of repair when no part of it is in a state of decay or dilapidation; and when, as a place of public worship, it is safe, healthy, and comfortable. When this cannot be predicated of the church, it cannot be regarded as altogether sufficient or suitable as a place of worship, and to the extent to which it is not so, it appears to be in a state of disrepair, to the effect of imposing on the heritors the duty of remedying the particular defect.

28. There is no judicial definition of the term comfortable as applied to a parish church, but the opinion may be hazarded that it implies such a disposition and arrangement of the parts of the building internally, including doors, windows, pulpit, and pews, as in accordance with the ideas of the times will enable the minister and the congregation, without difficulty or personal inconvenience, to conduct and take part in the public worship of God, according to the form sanctioned by usage and the rules of the Church. In the case of Ardrossan (*b*) it was said by Lord Low—"The duty of heritors is to provide a church which is safe and healthy, and in which the worship of God can be conducted with reasonable comfort."

(*a*) See *post*, CHAPTERS XII. and XIV.

(*b*) *Minister v. Heritors of Ardrossan*, 19th October 1901.

CHAP. V.

Defects not
involving dis-
repair.

Alternative
obligations
arising from
state of disre-
pair.

29. The mere circumstance, however, that the building is less elegant or commodious than suits a fastidious taste, or the fashion of the times, does not *per se* constitute a state of disrepair. To amount to this there must, it would appear, be such defects, either in the fabric or in the internal condition or arrangement of the building, as involve risk of accident or injury to health, or discomfort to those attending the church. When the building is in a state of disrepair, then the obligation on the heritors emerges to remedy the existing defect, and, according to its nature and extent, and the concurrent circumstances to be afterwards stated, the obligation arises either (1) when the church is legally repairable, to repair the fabric merely, or (2) when it is not legally repairable, to restore and, if necessary, enlarge it, or to rebuild it, *i.e.* to erect a new church altogether.

SECTION IX.—*When the Church is to be repaired merely.*

State of disre-
pair question
of fact.

30. Whether the church is or is not in a state of disrepair is a question of fact which, in some cases, is so palpable as to admit of no doubt, and therefore to require no formal investigation. In other cases it is a matter more or less difficult of detection, and sometimes it can only be ascertained on an examination of the fabric by men of skill. Even in those instances in which it is manifest to all that the church is in some degree in a state of disrepair, the extent to which it is so cannot be accurately appreciated or stated by non-professional persons. Hence the question of fact regarding the structural condition of the building, *quoad* disrepair, is in general formally ascertained by the heritors, the Presbytery, or the Court, from the reports of builders or architects to whom remits are made to examine and report on the subject.

Heritors' duty
when church
in disrepair.

31. When it is ascertained that the church is in a state of disrepair, the heritors are bound to remedy this defect ;

but in what way depends on this further point, viz., whether the building is or is not in "a repairable condition." If it be not in a repairable condition, then the heritors must rebuild the church. If it be in a repairable condition, then the heritors are bound to repair it merely.

32. While, in a certain sense of the expression, no building can be said ever to be absolutely unrepairable (*a*), it is, nevertheless, true of churches, as of other structures, that there is a certain state of disrepair arising from extensive decay and dilapidation which, when it exists, negatives the propriety or prudence of expending money in the fruitless attempt to put the church in a sufficient or serviceable condition. The exact point of dilapidation or decay which the church must have reached before it can be deemed to be in an "unrepairable condition" it is impossible to define, or even to explain with precision, as the meaning of the phrase is a relative one, and is truly dependent on considerations to which different minds may be inclined to attach different degrees of importance. Since, however, the duty of enlarging or rebuilding the church, as contrasted with repairing it merely, is enforceable against the heritors only when its fabric is not repairable, it falls within the scope of this section to attempt to explain, or at least to indicate, when a church may be said to be repairable.

33. The leading idea connected with this expression, while it undoubtedly embraces the material state and condition of the existing structure, is more immediately associated with the element of prudence or propriety in the outlay of repair expenditure. Although the building is, physically speaking, capable of being repaired, it is not legally so when it is not worth being repaired, *i.e.* when the cost of repairing it would

Unrepairable
condition,
quid?

Leading idea of
the term.

(*a*) In *M'Leod v. Carment*, 1830, 8 S. at p. 479, Lord Pitmilley says, "There is no building utterly incapable of being repaired;" and in *Bertram v. Presbytery of Lanark*, 1864, 2 M.P. 1413, Lord Neaves

observes, "There is scarcely any thing which may not be repaired; "a building which is in ruins may be restored altogether by a process of repairing."

CHAP. V.

be an injudicious investment of money. In considering whether this would or would not be so in a given case, the two main points to be kept in view seem to be (1) the relative cost and extent of the requisite repairs, as compared with the value and size of the church; and (2) the estimated duration of the building in a sufficient state if the requisite repairs were executed upon it.

When church
in repairable
condition.

34. Keeping these two points in view, a church may be said to be in a repairable condition when the existing structure can be made "sufficient and serviceable" as a place of public worship by the execution upon it of such operations as—relatively to the size and character of the building—do not amount substantially to alterations or additions to it rather than repairs, and—relatively to the present value and probable duration of the existing structure—are neither disproportionately costly, nor disproportionately substantial or extensive. A church will be deemed "sufficient and serviceable" when, the materials of which it is composed being in a sound condition, the building in itself is safe, healthy, and comfortable (*a*). When, therefore, moderate and judicious as opposed to very extensive and expensive repairs will put into such a condition a church which is in a state of disrepair, and, when it is so put, will maintain it in such a condition for a considerable time thereafter, viz., for a period of twenty-five years or upwards, then it would seem that the church is in what is legally termed a "repairable condition," and—as opposed to rebuilding—the heritors are bound to repair it merely. Such, shortly expressed, seems to be the doctrine deducible from the *dicta* expressed, or principles recognised, by the Court in the cases of *Stewarton* (*b*), *Kin-*

(*a*) See report by men of skill and Presbytery's deliverance in *Murray v. Presbytery of Glasgow*, 1833, 12 S. 192, foot, and 193, top. In this case, Lord Ordinary Mackenzie, in the passage quoted on next page, note

(*d*), uses the expression "*safe and serviceable*." The term *sufficient*, however, seems, on the whole, the more appropriate.

(*b*) *Cunninghame v. Deans*, 12th Dec. 1811, F.C.

cardine O'Neil (*a*), Rosskeen (*b*), Neilston (*c*), Kirkintilloch (*d*), and Inverness (*e*).

CHAP. V.

35. When the old church is either (1) in a sufficient state, or (2) in a repairable condition, the original fabric must be allowed to remain. But if (1) the building is in a structural point of view unrepairable; or (2) if, applying the rules by which a prudent person would be guided in regard to his own dwelling-house (*f*), the result arrived at is that it would be more economical and judicious to rebuild than to repair the church, then the church is, in a legal sense, unrepairable, and the heritors must build a new one. In forming an opinion on this point, it may as a general rule be stated, that the only matter which can legitimately form the basis of inquiry and the foundation of opinion is the existing structural condition of the fabric, including, of course, that of its different parts, as well separately considered as taken in combination with each other.

Question as between repairing and rebuilding.

36. Neither the circumstance that the building is inelegant in its design or plan, nor that it is defective in its internal arrangement, nor that it is inconveniently situated, nor even that it is, in point of size, insufficient to accommodate the legal proportion of the parishioners, constitutes, either singly or in combination, a sufficient

Non-essential matters.

(*a*) *Gordon v. Gordon*, 1846, 18 Jur. 595.

(*b*) *M'Leod v. Carment*, 1830, 8 S. 475.

(*c*) *Earl of Glasgow v. Miller*, 1831, 9 S. 370; *affd.* 7 W. & S. 185.

(*d*) *Murray v. Presbytery of Glasgow*, 1833, 12 S. 191. Here Lord Ordinary Mackenzie states the law on the subject thus—"A church is repairable excepting (1) where it cannot be made a safe and serviceable church by anything that could be truly called repairing at all. (2) Where it cannot be made a safe and serviceable church by any repair that could be used reasonably, or would be used except for the purpose of evading the legal duty of enlarging

"the church when rebuilt in order to suit it to the population, or, in other words, that would be reasonable or that would be used if the capacity of the church were not to be increased in rebuilding;" and his Lordship thought "that it could not be said that a repair which was to cost only about half the expense of rebuilding, and which gave fair expectation of affording a safe and serviceable church for a time of from twenty-five to thirty-five years, was in itself anywise absurd."

(*e*) *Macechern v. Heritors of Inverness*, 1885, 22 S.L.R. 604.

(*f*) Per Lord Robertson in *Cunninghame v. Deans*, 12th Dec. 1811, F.C.

CHAP. V.

reason for imposing on the heritors the expense of building a new church, as opposed to repairing the old one (*a*). This obligation emerges only when the building is either (1) structurally unrepairable, as above explained; or (2) when it ought not to be repaired, *i.e.* cannot be repaired consistently with motives of prudence, or the dictates of a wise economy.

Enlargement
or rebuilding
of church.

37. It usually happens that when, in respect of its unrepairable condition, a church is to be rebuilt, law also requires its enlargement, and thereby additionally augments the burden imposed on the heritors. Neither the abstract desirability, however, of increased accommodation on the one hand, nor, on the other, the increased expenses, which, if the alternative of rebuilding be adopted, may result to the heritors, forms a legitimate ground in deciding for or against this alternative (*b*). In arriving at a judgment on this matter, the points which appear to demand principal attention are these, viz.—(1) the cost of repairing the old church, as compared with that of building a new church of similar size; (2) the duration of the building, and the probable cost of upholding it for a given period, assuming a case of repair merely, as compared with the probable cost of rebuilding; and (3) the comparative cost of repairing the old church, and of building a new church of a size sufficient to accommodate two-thirds of the examinable parishioners.

Chief points to
be ascertained.

Considerations
tending toward
rebuilding.

38. In proportion as the difference in point of cost between repairing an old and building a new church decreases, the leaning of the Court tends in favour of rebuilding rather than repairing; and this inclination to adopt the former alternative will be strengthened in the case where the actual extent and nature of the repairs

(*a*) For this statement of what is understood to be the law on the subject, see the points decided, or opinions expressed, in the cases cited at the end of paragraph 34. In regard

to inadequacy of size, see *infra*, p. 126.

(*b*) See per Lord Ordinary Mackenzie in *M'Leod v. Carment*, *supra*, 8 S. at 477.

approximate toward a renewal or reconstruction of the building.

CHAP. V.

39. A rough but recognised mode of determining whether a church is repairable or not, and one which it is better to follow than to attempt comparisons of the details of the state of the several churches whose condition has come before the Court with the circumstances existing in the particular case in hand, is afforded by a comparative estimate of the cost of putting the church into a state of thorough repair while leaving it standing, and the cost of building a new church of the same size, making use of the materials of the old structure. If the one is only half the other, repair will usually be sufficient (*a*), if three-quarters or thereabout, rebuilding or restoration and enlargement will be ordered (*b*), if between these fractions, the Court will be influenced one way or another by special circumstances, such as the respective expectation of life of the repaired and of a new church, the attitude of the bulk of the heritors (*c*), the size of the building in relation to the population (*d*), and the sanitary condition of its surroundings (*e*).

Relative cost as a test.

SECTION X.—*Enlarging the Church.*

40. According to the opinion of Mr. Duncan, and his treatment of the subject, the obligation to enlarge a church was quite distinct from the obligation to rebuild, and the former obligation might exist in a number of circumstances where the latter did not arise. If the church, though repairable, was in bad repair, and the accommodation was insufficient for the parish, then the heritors were bound to enlarge the church. This view undoubtedly receives some encouragement from the cases of Dunning (*f*), and of

Whether obligation exists when church repairable.

(*a*) *Murray v. Presbytery of Glasgow*, 1833, 12 S. 691.

(*b*) *M'Leod v. Carment*, 1830, 8 S. 475.

(*c*) *Bertram v. Presbytery of Lanark*, 1864, 2 M.P. 1406, 1414.

(*d*) Per Lord Pitmilley, in *M'Leod v. Carment*, *supra*.

(*e*) This para. follows very closely Rankine on Land Ownership, p. 660.

(*f*) *Minister v. Heritors of Dunning*, 1807, Mor. Appx. *Kirk*, 4; Connell Par. Supp. p. 43.

CHAP. V.

Lerwick (*a*). Mr. Dunlop (*b*), on the other hand, inclined to the view that where the church was legally repairable, the heritors could not be compelled to enlarge any more than to rebuild the church. This latter opinion is substantially in accordance with the unanimous opinion of the consulted Judges in the case of Methven (*c*), and must therefore here be held, notwithstanding Mr. Duncan's opinion, as law. In the case referred to it is laid down by the consulted Judges—

“Increase of population does not appear to have been considered by the Court as warranting a demand to enlarge the church, unless the church at the time of the demand was so ruinous as either to render it necessary to rebuild it, or to give it such extensive repairs that an addition became a matter of little moment in adding to the expense.”

Qualification of
general rule.

41. In supplement to the qualification of the general rule embodied in the passage just quoted, these three propositions may, it is thought, be accepted:—(1) When a church is legally not repairable in the sense explained in the section immediately following, and the heritors are therefore under an obligation *legally* to rebuild, it does not follow that they must *physically* erect an entirely new structure. They may elect to restore, and, if necessary, to enlarge the old building, utilising such parts of the existing fabric as, consistently with the state of the building and comfort of the congregation, can be spared. (2) Although the heritors cannot be compelled to enlarge the church merely because it is too small and needs some repairs, when the question becomes a narrow one, as to whether the church is repairable, and whether, therefore, it falls to be repaired or to be rebuilt, its inadequate size, and its consequent insufficiency to accommodate parishioners, or to afford sufficient air space in proportion to the sittings, are legitimate considerations to be taken into account as deter-

(*a*) *Menzies v. Heritors of Lerwick*,
Connell Par. Supp. p. 44.

(*b*) Dunlop, p. 25.

(*c*) *Lynedoch v. Smythe*, 1828, 6 S.
791.

mining in favour of rebuilding. (3) Although the heritors are not bound to enlarge a legally repairable church, they cannot, under the subterfuge of treating what is really a rebuilding, or a complete restoration, as merely a repairing, avoid the obligation to enlarge. It is not enough that the church is built upon the same site, and that some of the old masonry is used. If the size of the church is inadequate, and the work of repairing and restoring is to cost appreciably more than one-half of what it would take to build a new church of the old size, utilising the materials, then the heritors, if they do not build an entirely new church, must enlarge the old one in restoring it.

SECTION XI.—*When the Church must be rebuilt.*

42. Giving to the Act of Privy Council of 1563 a somewhat free interpretation, and construing it as a provision which was not to operate only once for all, but was to be a permanent regulation applicable as often as churches should fall down or decay, the law recognises legal obligation, in certain circumstances, to rebuild the parish church. When its fabric is in such a state of disrepair as amounts to an “unrepairable condition,” the heritors are bound to rebuild it, *i.e.* to build a new church, or to restore, and, if necessary, enlarge it. As already fully explained (*a*), a church is unrepairable in law not only when the building is in such a state of ruin or dilapidation, or structural unsoundness, as to render practically impossible, or unsafe, the operation of introducing into, or engrafting upon, the existing fabric the new materials required in its reparation, but also when the outlay on repairs required to put the church in a sufficient and serviceable condition would, in the circumstances, and having regard to the probable life of the building in a state of sufficiency after it is repaired, be an injudicious expenditure. The rules which cover this matter have already been fully explained above.

Scope of the obligation.

Unrepairable condition, *quid?*

(*a*) *Supra*, SECT. IX.

CHAP. V.

Doctrine in case
of Methven.

43. Inadequacy of size in relation to the population of the parish will not subject the heritors in the burden of rebuilding or enlarging the church. This doctrine was carefully considered and deliberately decided in the case of Methven in 1828 (*a*), where it was applied to a parish church though originally built without the sanction of the Presbytery. The doctrine was subsequently affirmed in the case of Neilston (*b*) in 1834, which was appealed for the very purpose of trying the validity of the judgment in that of Methven, and it may now be considered as completely settled.

Affirmed in that
case of Neilston.

44. In deciding the case of Neilston, reference was made to the cases of Dunning (*c*) in 1807, and of Lerwick (*d*) in 1820, which, Lord Brougham remarked, it was somewhat difficult to reconcile with the principle of judgment in the case of Methven. From the report of the case of Dunning, it is certainly to be inferred that the only ground on which the Presbytery, and afterwards the Court, proceeded in

Import of the
case of
Dunning.

(*a*) *Lynedoch v. Smythe*, 1828, 6 S. 791. Here the church of Methven, which was built in 1783 without the sanction or approval of the Presbytery, was calculated to hold 700 sitters, but it did not appear whether such was the legal amount of accommodation at the time, as no deliverance by the Presbytery existed declaring the church sufficient. By the year 1821 the population had so increased, that two-thirds of the examinable parishioners amounted to 1274 persons, being 574 in excess of the number of seats in the church. In this condition of matters, and when the church was in a state of good repair, a majority of the heritors resolved to build an addition to it. Having obtained plans of the proposed alterations, they submitted them to the Presbytery, who approved thereof, and decreed against the heritors generally for the estimated expense. Thereupon, two of the principal heritors suspended, pleading that when a church was in good repair the heritors could not be called on to enlarge it on account of deficiency of

accommodation. This plea the Court unanimously sustained.

(*b*) *Earl of Glasgow v. Miller*, 1831, 9 S. 370; *affd.* 7 W. & S. 185. Here the church, which was originally built in 1762, contained less than 500 sittings, was enlarged in 1798 so as to accommodate about 800 persons. Between 1762 and 1828 the population of the parish, which included one or two villages, had, chiefly from the establishment of public works within it, increased from 1800 to 6800 souls. As the case was pleaded in the Court of Session, parties were at variance whether it was or was not in a state of repair. In the House of Lords, however, the appellant's contention that it was in a state of disrepair was expressly abandoned; and, on a careful review of the law and authorities on the point, the abstract doctrine, as laid down by the Court of Session in the case of Methven, was affirmed and applied.

(*c*) *Minister v. Heritors of Dunning*, 1807, M. *Kirk*, Appx. 4.

(*d*) *Menzies v. Heritors of Lerwick*, 27th Jan. 1820, not reported. See Connell Par. Supp. p. 44.

ordaining the heritors to enlarge the church was that of want of accommodation; and that the argument of the heritors was mainly, if not entirely, confined to the question of the Presbytery's jurisdiction. A reference to the Session papers in the case confirms this view, and shows (1) that the substantial and indeed only ground on which the Presbytery and the Court relied, in ordaining the heritors to enlarge or rebuild the church, was that of want of accommodation apart from any question of disrepair; and (2) that so far as the pleadings go, the heritors never seriously disputed that such was a sufficient ground of judgment, but, on the contrary, confined their arguments (on the merits of the question) to establish the point that there had been no such increase in the population of the parish from the repairing of the church in 1783 down to the then date, as warranted the demand for increased accommodation (*a*).

45. In the case of Lerwick the first report of the tradesmen set forth that the church could not accommodate more than 580 persons, and specified various structural defects which implied a state of serious disrepair. By their first deliverance the Presbytery found that the church was too small, and that the gallery and roof were insufficient, and ordained the heritors to give in plans and estimates for necessary enlargement and repair. In the Presbytery's subsequent proceedings, as well as in the interlocutors of the Court, the point as to the state of disrepair was somewhat overlooked; and in the several deliverances pronounced ordaining the church to be enlarged, the matter chiefly dealt with was the want of accommodation as arising from the increased population of the parish. The opinions, however, expressed by the Court (*b*) indicate that the judgment ultimately pronounced, ordaining the church to be enlarged,

Import of the
case of
Lerwick.

(*a*) See Fac. Coll. Sess. Papers, 1807, No. 282.

and the opinions of the Judges, see Connell Par. Appx. pp. 44-53, and pp. 125-30.

(*b*) For a statement of this case

CHAP. V.

was in part rested on its existing state of disrepair. The state of disrepair, however, appears far short of what would *per se* have warranted an order to rebuild, and though the Judges who decided the case of Methven (*a*) thought the Lerwick case not inconsistent with their view of the law, the two cases do not stand well together.

State of disrepair in case of Bothwell.

46. In the case of Bothwell (*b*), where, on the assumption that the heritors had judicially admitted that the church ought to be enlarged, the Court ordered plans to this effect to be prepared, its condition was this:—The interior of the church was in a very bad state of repair, especially the seating and flooring. The walls were in several places considerably decayed, but were capable of being repaired by pointing and renewal of several stones. The walls of the addition to the old church, built in 1700, appeared to be plumb, but of little value. The timber of the roof was in a decayed state, and in several places in danger of coming down (*c*). This case appears to belong to the intermediate category referred to above, where the state of disrepair was such as to place the question of “repairability” upon that border line where inadequacy of size becomes a legitimate consideration to be taken into account.

General rule.

47. Although the reported cases undoubtedly create some difficulty, and narrow questions may still arise, there can be no doubt that the general rule is now established, that heritors cannot be compelled to rebuild or enlarge a repairable church in respect merely of its inadequacy of size in relation to the population of the parish. On the other hand, as above indicated, when the question arises as to whether a church is legally “repairable,” its inadequacy of size may, within

(*a*) In *Earl of Glasgow v. Miller*, *supra*, 7 W. & S. at p. 206, Lord Brougham observes, that in so far as the remarks of the Judges in the case of Lerwick are inconsistent with the judgment in the case of Methven, they are to be treated as *obiter dicta* unsupported by decision.

(*b*) This case repeatedly came before the Court, and is reported under the following names and dates: —*Hamilton v. Presbytery of Hamilton*, 1827, 6 S. 47; *Campbell v. Jack*, 1829, 8 S. 196, and 1830, 9 S. 167.

(*c*) See report of architect, 6 S. 48.

certain narrow limits, be a makeweight in the determination of the question. If the church is not repairable, then the heritors may utilise the old fabric and call it a restoration, or they may rebuild the church altogether on the same or a new site; but in either case they must build it of adequate size, in relation to the population, and in a legal sense, and as regards legal incidents, the former operation, as much as the latter, is a "rebuilding" of the church.

SECTION XII.—*Relation between Presbytery and Heritors in regard to rebuilding or repairs.*

48. It is not necessary that the Presbytery's sanction should be obtained before the work be undertaken, OR their approval of it when finished (a). In the discharge of the legal duty of maintaining the church, the body of heritors are entitled to act on their own judgment; and the interference of the Presbytery is sanctioned only to the effect of seeing that this duty is honestly and judiciously performed. Unless, therefore, the alternative of repairing the church merely be not, in the circumstances, the proper course to adopt, or—if it be the proper course—unless the repairs, as ordered or performed, be insufficient in their extent or in the mode of their execution, the Presbytery has no right to control the action of the heritors in the matter.

Presbytery's sanction of work not necessary.

49. When the resolution adopted is to enlarge or rebuild the church, plans and specifications should, under a remit to a person of skill, be prepared, and an estimate of the cost of carrying them out should be furnished. The body of heritors frequently adopt the course—especially when the resolution is not an unanimous one, or has been passed at a meeting attended by few heritors—of submitting the plans of the proposed additional or new building to

Plans ordinarily submitted to Presbytery for approval.

(a) *Boswell v. Duke of Portland*, 1834, 13 S. 148, and there *per curiam* p. 155. The case of *Campbell, Petr.*, 19th May 1815, F.C., is not authoritative.

CHAP. V.

the Presbytery, and of obtaining their approval thereof before proceeding to carry them out. The adoption of this course is not absolutely requisite, inasmuch as the Presbytery are not entitled to dictate to the heritors what the plan or style of the structure is to be, provided only it be sufficient and serviceable as a place of public worship (*a*). Still, as the approval by this ecclesiastical body of the particular operation proposed by the heritors' resolution to be carried out amounts to a certificate that it is, in the opinion of the Presbytery, the appropriate course to adopt, their approval of the plans and specifications connected with its execution will exclude any objection on this point at their instance hereafter, and may—especially when the resolution has been carried at a small meeting of the heritors—be of advantage in so far as it affords an additional guarantee that the resolution is a correct one on its merits.

Nature of Presbytery's control over plans furnished.

50. When the matter has taken the form of an application to the Presbytery, and in obedience to the order of that body plans and specifications of the proposed operation are furnished and laid before them by the heritors, these plans are considered by the Presbytery, who decide upon the one they think best; or refuse to approve of any of those produced, and ordain others to be prepared; or approve of one or other of the plans submitted, subject to certain modifications. The extent of the Presbytery's right of control of the plan according to which the church is to be enlarged or rebuilt is of a limited nature, and, as a general rule, is confined to matters which bear upon the sufficiency of the requisite alterations, and to the amount, rather than to the

(*a*) Thus, in the *Minister v. Heritors of Tingwall*, 1787, M. 7928, the Court were in general of opinion "that the plan of building might be concerted among the heritors themselves without the intervention of the Presbytery, whose only province it was to see that the church was of a proper size for accommodating those who attended public wor-

ship." See also per Lord Alloway in *Hamilton v. Presbytery of Hamilton*, 1827, 6 S. at p. 50, and in *M'Neill v. Nicolson*, 1828, 6 S. at p. 425, where his Lordship says, "With the nature of the structure of the church to be built, however, the Presbytery had nothing to do if proper accommodation is provided."

style, of the accommodation to be provided. The Presbytery are entitled to be satisfied that the plan of the proposed enlargement of the church, or of the new church, is such as implies a thoroughly commodious and conveniently arranged edifice, and one that will prove sufficient and serviceable. Beyond this, however, their right of interference does not seem to extend (*a*). In particular, they are not entitled to insist that the heritors shall adopt a particular plan merely because it is more handsome or elegant than another (*b*); or—in the case of rebuilding a church—that one situation rather than another is to be selected because in their opinion it is more picturesque, or even more convenient (*c*).

51. After a plan is approved of by the Presbytery to which some of the heritors object, the objectors are entitled to bring it under review of the Civil Courts (*d*). Indeed, this right is competent to an individual heritor (*e*). In the case of Bothwell (*f*) two antagonistic plans for the reparation of the church were given in by two sections of the heritors to the Presbytery, who selected and approved of the one which implied the rebuilding of the church. Thereupon the other section of the heritors presented a bill of suspension of the Presbytery's deliverance, which was passed by the Court with a view to determine which of the two rival plans was to be selected.

52. When the body of heritors neglect or refuse to take such steps as are necessary to render the church sufficient

Review of plan approved of by Presbytery.

Presbytery's interference on refusal of heritors to take action.

(*a*) See *per curiam* in *Minister v. Heritors of Tingwall*, *supra*, M. 7928, and in *Hamilton v. Presbytery of Hamilton*, *supra*, 6 S. at p. 50, where Lord Alloway says, "that although the Presbytery are entitled to provide proper accommodation for the parish, they have nothing to do with the mode of doing it, so as it be done effectually."

(*b*) Thus, see *dictum per Lord Alloway* in *M'Neill v. Nicolson*, *supra*, 6 S. at p. 425, already quoted.

(*c*) In *Hamilton v. Presbytery of*

Hamilton, *supra*, 6 S. at 50, Lord Glenlee remarked that the Presbytery "had nothing to do, however, with "fixing the situation or place of the "new church or addition."

(*d*) Now, in the first instance, of the Sheriff, under 31 and 32 Vict. c. 96.

(*e*) See *per Lord Robertson* in *Campbell*, 19th May 1815, F.C., and 31 and 32 Vict. c. 96, s. 3.

(*f*) *Campbell v. Jack*, 1829, 8 S. 196.

CHAP. V.

and serviceable, then the Presbytery of the bounds may ordain them to do so; and, failing compliance with such order, may themselves proceed to take active measures in the matter. This general doctrine, which is now well fixed, has been recognised as unquestionable ever since the judgment in the case of *Dunning* (a). The mode and circumstances in which the Presbytery exercise this right of jurisdiction are elsewhere pointed out (b).

SECTION XIII.—*Size of Church when it is to be enlarged or rebuilt.*

Size of church
not matter of
legislative pro-
vision.

53. No specification is contained either in the Act of Privy Council of 1563, or the statute 1572, c. 54, regarding the required size of the parish church; and neither by these nor by any other legislative enactments has any obligation been expressly imposed on the body of heritors to increase, even when greatly insufficient, the accommodation which the church affords. It has been already explained, however, that they are bound to do so in certain circumstances. This obligation is traceable either to a free and extended interpretation of the Act of Privy Council, or to judicial authority supported by long usage, which has also introduced in connection with this obligation a certain fixed standard for the size of the church.

Case of
Tingwall.

54. One of the earliest cases in which a judgment on this subject was pronounced is that of *Tingwall* in 1787 (c). Here the population of the parish was 1069 persons, of whom 847 were of the age of twelve years and upwards. The heritors proposed to build a new church fitted to hold 426 sitters. The minister insisted that it should accommodate 585, being rather more than two-thirds of the above number of 847 persons. The Presbytery pronounced a deliverance

(a) See *Minister v. Heritors of Dunning*, 1807, M. *Kirk*, Appx. 4. Also per Lord Robertson in *Cunninghame v. Deans*, 12th Dec. 1811, F.C.

(b) See *post*, CHAPTER XIV.

(c) *Minister v. Heritors of Tingwall*, 1787, M. 7928.

to this latter effect, which the Lord Ordinary (Hailes) affirmed (*a*). On a review of his judgment, the Court found that the heritors "are obliged to build a church capable of containing two-thirds of the examinable persons in the parish, not under twelve years of age, and remitted to the Lord Ordinary to proceed accordingly."

55. The term "examinable persons" here used was explained from the Bench to apply to those of the parishioners who were twelve years of age; and it was added that the standard of accommodation adopted in this instance "was laid down as a general rule to be observed in all time coming." The principle of this rule appears to be that it represents the proportion of the parochial community who either could or, according to reasonable probability, would attend the church at any one time. Its adoption is so accounted for in the cases of Methven (*b*) and of Ross-keen (*c*), in the latter of which it was remarked,—“The reason of two-thirds of the population being taken is that this is the probable number of hearers,” *i.e.* worshippers! The standard of accommodation recognised, if not introduced, for the first time by the Court in the case of Tingwall has since then been usually adopted, and may now be regarded as that which will in ordinary cases regulate the size of the building when a parish church has either to be enlarged or rebuilt. The inhabitants of a portion of the original parish disjoined *quoad sacra* do not fall to be taken into account, being enjoined by law to attend the church of the parish *quoad sacra*.

56. Two instances, however, may be cited in which a smaller amount of accommodation than that now indicated was, in the special circumstances, held sufficient. Thus, in the case of Barra (*d*), where the greater number of the par-

Meaning of term "examinable persons."

Exceptions.

Case of Barra.

(*a*) See Connell Par. Supp. p. 32.

(*b*) Lynedoch v. Smythe, 1828, 6 S. 791, and there per Lord Ordinary Mackenzie in his Note, at p. 792.

(*c*) M'Leod v. Carment, 1830, 8 S.

475, and there per Lord Cringletie, p. 479, as cited in text.

(*d*) M'Neill v. Nicolson, 1828, 6 S. 422.

CHAP. V.

ishioners were Papists, the Presbytery, on this ground, in decerning for the erection of a new church, limited its accommodation to an extent below the legal standard. In a suspension of their deliverance at the instance of the only heritor in the parish it was affirmed by the Court, on the ground that the departure from the rule in this instance was in favour of the heritor.

Case of Bothwell.

57. The rule was also departed from in the prior case of Bothwell (a), where the population of the parish was assumed to be 4000. Here the Presbytery ordained a new church to be built at the west end of the old building, capable of containing 1600 sitters. This site being inconvenient, the Presbytery suggested that the heritors should carry into effect a proposal to build a chapel of ease; in the event of which being done, the Presbytery stated that they "would consider themselves authorised to order a church of smaller size." Certain of the heritors brought a suspension of this deliverance on the ground that the existing church was repairable, and should not be enlarged. The Presbytery, and a minority of the heritors judicially admitted that a church capable of containing 1200 sitters was in the meantime sufficient, and agreed to restrict the deliverance accordingly. In virtue of this consent the Lord Ordinary refused the bill, so far as the decree extended beyond this limitation, and the Court passed the bill *in toto*, in respect it did not appear that the church was unrepairable. On considering a report on this point the Lord Ordinary appointed a part of the building to be pulled down, and "such a new building to be erected as, in conjunction with the old building already ordered to stand, will contain 1200 seats for hearers." Both parties reclaimed, but subsequently the suspenders withdrew their reclaiming note, and the only question which remained for decision was whether the new portion of the church to be erected was to contain 1600 or 1200 sittings. The Court

(a) *Hamilton v. Presbytery of Hamilton*, 1837, 6 S. 47.

adhered to the Lord Ordinary's interlocutor on this point, on the ground that the Presbytery and the concurring heritors had judicially admitted that accommodation for 1200 persons was sufficient—the presumption being that the Presbytery would not consent to the erection of a church “incompetent” for its purpose (*a*). This *ratio decidendi* implies that the decree of the Presbytery, ordering a given amount of accommodation in the cases of enlarging or rebuilding the parish church, raises a presumption that the amount of accommodation decreed for is the legal amount, or that which, as at the date of their deliverance, could be decreed for, even although it may in point of fact be less than in proportion to two-thirds of the examinable parishioners.

58. Notwithstanding the case of Barra, the judgment in which was exceptional, the general rule is that, in estimating the proportion of two-thirds of the examinable persons in the parish, no consideration is paid to the circumstance that a certain number of the parishioners are not members of the Established Church, but belong to other religious persuasions; or even that a considerable section of the community do not at all, or at least familiarly, understand the language in which the ministrations of religion are conducted at the parish church. An opinion on the former point to the effect just stated was expressed in the case of Rosskeen (*b*), where a decision on the latter point was pronounced.

“Examinable persons,” how calculated.

59. The size of the church necessary to accommodate the prescribed number of sitters must depend on the air space and the sitting accommodation required for each sitter. It has been said that there is a legal amount of space for each sitter according to a definite rule, viz.—a lateral breadth of

Sitting accommodation in relation to size of church.

(*a*) See per Lord Ordinary Cringletie, 6 S. at p. 49.

(*b*) Per Lord Justice-Clerk Boyle in *M'Leod v. Carment*, 1830, 8 S. at p. 478. Here, one-half of the parishioners seem to have been Gaelic, and, founding on this circumstance, the heritors appear to have pleaded

that they were only liable to provide church accommodation for one-half of the community. This plea, however, was repelled, his Lordship remarking that he could “not give the least countenance” to the doctrine it involved.

CHAP. V.

18 inches for each sitter and a width of 29 inches, including the wood; but there is no such rule, although in certain cases these dimensions may have been sanctioned (*a*). The true criterion, both as regards dimensions of pews and air space, is the standard of comfort and convenience and hygiene accepted at the time. The parishioners are entitled to have provided for them just such a church as a reasonably affluent voluntary congregation would provide for themselves. They are not entitled to demand more, and they are not bound to put up with less. It is unreasonable to suggest that heritors are entitled to construct and fit up a church in a manner which, if adopted by a voluntary congregation, would empty their church.

SECTION XIV.—*Site of new Church when one is to be rebuilt.*

General rule
proximity to
old church.

60. When the church is to be rebuilt, the new structure should as a general rule be erected upon or as near to the site of the old church as circumstances will admit. While the body of heritors, especially if they act unanimously in the matter, have a considerable control in the choice of the ground on which the new church is to be built, the Presbytery will not be justified in sanctioning a change of situation without very strong reasons, and it may even become their duty to interfere to prevent the adoption of the site proposed by the heritors. In the case of Kincardine O'Neill (*b*), where the Court of Teinds refused to sanction the transportation of a church to another situation, although the change was approved of by a majority in valuation of the heritors, by the minister of the parish, and by the Presbytery of the bounds, the doctrine was stated that a change of site was objectionable where it operated to remove the bulk of the parishioners further from the parish church than they were before, and

(*a*) See *infra*, Sect. 63.

(*b*) Gordon v. Gordon, 1846, 18 Jur. 595.

thereby induced them to forsake it for dissenting chapels, or where it increased the distance of the manse from the church.

CHAP. V.

61. The rule of building the new church on the site of the old was strictly adhered to in the case of Falkirk (a). Here, although the building of the new church on the site of the old involved an encroachment on the graves within the churchyard, and although ground for the new building was offered gratuitously, it was nevertheless held that this did not justify a change of site. When a change of site is indispensable the extent of the change should be as small as possible, and a governing element in the situation of the ground for the new church is proximity to the manse (b).

Rule followed in the case of Falkirk.

Proximity to manse.

SECTION XV.—*Parts and Pertinents of the Church.*

62. The heritors are bound to fit the church up with pews, and to maintain these in good order and repair. As the mode of conducting public worship according to the Presbyterian ritual implies the existence of seat accommodation, the obligation of providing such accommodation is included under that of enlarging or rebuilding the church (c). Heritors are also bound to provide the other adjuncts which are recognised as pertinents of the church, such as a bell (d), and the furniture required for the celebration of the sacraments of baptism and the Lord's Supper.

Pews, bell, &c. parts of the church.

63. The question of sitting-room in relation to the size of the church has already been referred to above. There is no legal rule as to the space to be allowed for each sitting; but, as stated above, in calculating the extent of accommodation to be provided the size of a seat for each person seems

Legal size of pew.

(a) *Wilson v. Ogilvie*, 16th Dec. 1809, Connell Par. Supp. 63.

(b) See per Lord Ordinary Cringletie in *M'Neill v. Nicolson*, 1828, 6 S. at p. 423.

(c) See terms of Lord Ordinary Cringletie's interlocutor in *M'Leod v. Carment*, *supra*, 8 S. 477; also per

Lord Ordinary Kennet in *Home or Marchmont v. Heritors of Eccles*, 1777, 5 Br. Supp. 558; also reported Mor. 7924, App. *Kirk*, No. 2, and Hailes, 734.

(d) *Home v. Heritors of Eccles*, *supra*.

CHAP. V.

to have been computed at about 18 inches in breadth (*a*), and the width of the pew at about 29 inches. Such was the size of each sitting as fixed by the Presbytery in the Peterhead case (*b*), and such was the minimum size of each sitting and the width of the pews as proposed by the architect in the case of Bothwell (*c*). People cannot, however, sit and worship with comfort within such an allowance of space, and whilst law enjoins the provision of church accommodation for the people, it does not require the people to put up with discomfort during divine service (*d*).

Standard of
comfort.

64. Cognate to the question of the extent of the accommodation is that of the general standard of comfort and convenience in the internal arrangements of the church. The nature of these arrangements must vary in accordance with the customs of the times. A curious notion, however, prevails, and has perhaps received some judicial encouragement, that the legal obligation of the heritors in the matter has been for ever fixed and stereotyped, and that this obligation is to make the church such as would have satisfied legal requirements, and been according to the standard of the times, about the close of the eighteenth or the beginning of the nineteenth century. But this is an unreasonable suggestion. A century earlier than that very few country churches were fitted with pews, many of them were roofed with thatch, and many had no flooring. That state of matters had passed away by the beginning of the nineteenth century, except, perhaps, in some remote Highland districts, and in then deciding what were the legal requirements nobody thought of going back to inquire into the customs of the seventeenth century. In the same way, since the close of the eighteenth century there has been a great change in the internal structure and

(*a*) Connell Par. Supp. p. 72.

(*b*) Harlaw *v.* Merchant Maiden Hospital, 1802, 4 Paton, 356.

(*c*) Hamilton *v.* Presbytery of Hamilton, 1827, 6 S. 47.

(*d*) In the Shettleston case the

Sheriff-Substitute directed that at least 21 inches by 32 inches be allowed in the pews for each sitter in all parts of the church (Black, Par. Eccl. Law, p. 87).

arrangement of Presbyterian and other churches. Modern heating arrangements, for example, were then unknown; the windows were often so constructed that they could not be opened. In country churches there was seldom a porch, or any roof ventilation; there was no open space for a table in front of the pulpit, and every possible inch of the basement all round and close up to the pulpit at the sides was covered by low galleries. No voluntary congregation, however poor, would construct a church for itself upon these lines now, and it is unreasonable to suggest that the heritors, whose duty it is to provide a suitable place of worship for the parishioners desirous of adhering to the Established Church, can claim to satisfy their legal obligation by providing a church fitted up and arranged according to the custom and requirements not of the present day but of a hundred years ago. At that time all pews were constructed with upright backs, and were fitted with doors. At the present day pews are always constructed with slightly sloping backs and without doors. It would be as unreasonable in the case of a new church for the heritors now to insist upon upright-backed pews as for the Presbytery to insist that the heritors should fit the pews with doors, because these were the respective modes of construction a century ago.

65. The obligation devolving on the heritors to furnish basins and lavers, and, constructively, towels, used for or on the occasion of dispensing the rite of baptism, and also tables, table linen, and sacramental vessels, required for the celebration of the Holy Communion, is expressly imposed on the heritors by the Act 1617, c. 6 (a).

Heritors bound
to furnish
sacramental
furniture.

66. A bell is peculiarly a pertinent of the parish church, and it has been stated judicially that it is the privilege of the Established Church alone "to assemble her members for public worship by the sound of a bell," dissenters not being

Church bell.

(a) See *post*, CHAPTER XVII.

CHAP. V.

entitled to use one (*a*); but this rule, if it existed, is now in desuetude. As forming an adjunct of the church, the heritors, whether in a landward or in a burghal-landward parish, seem bound to contribute for the purchase of a bell to the church on the same footing and in the same proportion as they are liable in the expense of maintaining the building (*b*).

Steeple, when
adjunct of
the church.

67. Although a steeple is not an essential part of a parish (*c*) church, yet when a steeple has been attached to the building it thereafter forms a part of the church (*d*); and if a bell has been put into the steeple, although after the date of the erection of the church, the bell thereafter becomes part of the church, and is treated accordingly. This holds even although—the church being situated in a burgh—the bell has been placed in the steeple avowedly for the convenience of the town (*e*). In the case of Montrose (*f*), which was a burghal-landward parish, it was ruled that money derived from the ringing of the church bell did not belong to the poor, but was burdened with the reparation of the church. In *M'Naughtan v. Magistrates of Paisley* (*g*) it was held illegal for the magistrates of a burgh to authorise the ringing of bells attached to an Established Church within the burgh on the application and for the use of a dissenting body, and interdict was granted accordingly at the instance of the minister and kirk-session of the church. A similar decision was pronounced in the Peebles case (*h*), where the bells had been provided by the burgh, and were hung in a tower adjoining the church erected by the burgh under an

Bell money,
how appli-
cable.

Illegal ringing
of church bell.

(*a*) See per Lords Meadowbank and Medwyn in *M'Naughtan v. Magistrates of Paisley*, 1835, 13 S. 434–5.

(*b*) *Inverkeithing Parishioners v. Rosyth*, 1642, M. 7914.

(*c*) See *Earl of Home v. Heritors of Eccles*, *supra*, 5 Br. Supp. 558.

(*d*) Per Lord Meadowbank in *M'Naughtan v. Magistrates of Paisley*, *supra*.

(*e*) Per Lord Medwyn, in *M'Naughtan v. Magistrates of Paisley*, *supra*, 13 S. at 436, foot and over.

(*f*) *Ministers v. Magistrates of Montrose*, 1730, M. 7915.

(*g*) *Supra*, 13 S. 432.

(*h*) *Magistrates of Peebles v. Kirk-Session*, 1874, 1 R. 1139; *affd.* 2 R. (H.L.) 117.

agreement that the tower and the bells were to be the property of the burgh, but were to be used to summon the worshippers to the parish church.

CHAP. V.

SECTION XVI.—*Building, how impressed with character of Parish Church.*

68. Buildings are not now, as they were in Popish times, devoted to the use of places of public worship and the administration of the sacraments by consecration. Nevertheless, there is a dedication of them, either actual or constructive, recognised by our law. In the case of churches originally erected, as opposed to rebuilt, since the Reformation, the decree authorising the erection of the building, or recognising its existence in connection with the parochial alteration which is sanctioned, is that which confers upon it the status of a parish church.

Dedication of
buildings *qua*
churches.

By decree in
case of
churches
erected since
1560.

69. In the case of buildings existing at the time of the Reformation which have since then been used as churches in connection with particular districts, the fact of their use as parish churches operates to impress them with this character, although no special decree or deliverance to this effect may exist or have been pronounced, and even although the building did not exist as a parish church before the Reformation. To this effect is the case of St. Leonards (*a*). Here the church in question had, prior to 1560, been connected with the Hospital of St. Leonards; and the officiating clergyman, styled *curatus*, was paid not out of the teinds, but from the revenues of that establishment. After the Reformation, however, the church was not distinguishable from any other parish church, save by the circumstance that the clergyman was supported not out of the teinds of the parish, but out of those belonging to the Priory of St. Andrews, under a decree of the Commissioners of Plat. In an action by the minister for the designation of a glebe the

By use of those
erected before
1560.

Case of St.
Leonards,

(*a*) Nicoll v. Hunter, 1829, 7 S. 479.

CHAP. V.

Methven.

Urquhart.

College of St. Andrews maintained, but unsuccessfully, that St. Leonards was not a proper parish church. In the case of Methven (*a*), the church, erected in 1783, although without the formal sanction or approval of the Presbytery, was, from use and recognition as such, dealt with as being the parish church. In the case of Urquhart (*b*), where the church was rebuilt, two of the Judges expressed the opinion that when the new church was erected and taken possession of by the minister with the sanction of the Presbytery, this operated *per se* to invest the new building with and divest the old building of the character of the parish church.

Building while
church *extra*
commercium.

70. While the building is dedicated to the use of the parochial community as a place of public worship, and remains clothed with the character of the parish church, it is sequestered from the ordinary uses of property and placed *extra commercium* (*c*). When, in the case of transporting or rebuilding the church, the old building has *de facto* ceased to be the parish church, its fabric and the materials composing it become secularised and belong, apparently as common property, to the heritors of the parish, whose rights and interests therein will probably be regulated on a similar principle to that which determined their liability to contribute toward the expense of the new church, viz. the respective amounts of their valuations.

Double rela-
tionship of
heritors *quoad*
the building.

71. As regards the parish church, the body of heritors occupy a twofold relationship. *Quoad* the fabric of the church *qua* property, they stand in the position of joint owners and co-proprietors. *Quoad* the building *qua* church, they hold it pre-eminently in the character of managers or trustees for behoof of the parochial community, and subordinately as guardians of it for their own patrimonial

(*a*) Lynedoch v. Smythe, 1828, 6 S. 791.

(*b*) Duke of Richmond v. Earl of Fife's Trustees, 1844, 6 D. 701. See

per Lords Jeffrey and Fullerton, 703-4.

(*c*) Per Lord Ordinary Cuninghame in Easson v. Lawson, 1843, 5 D. at 1433, foot.

interests. The co-existence of these two relationships it is difficult to realise while the building continues to retain its character of a "parish church." But whenever it ceases to be so the fact of their existence, as well as the distinction between them, become appreciable. Then the structure, but not the site if in the graveyard, reverts to the category of ordinary property, and the heritors of the parish by whom, or whose predecessors in their respective lands, the church was built and has been maintained, appear entitled to exercise the rights of joint owners of the fabric (*a*).

SECTION XVII.—*Uses to which the Church may be applied.*

72. The primary object for which a parish church is erected and exists is to afford a suitable structure within which the public worship of GOD may be celebrated and the sacraments of religion administered to the parishioners; and the peculiarly appropriate use to which the edifice is applicable is in conformity with this twofold object. There are, however, certain subordinate uses more or less intimately associated with the one now mentioned for which the parish church may be employed. Meetings which partake of a religious character, or an educational or charitable purpose immediately connected with, or at least directly bearing upon, the moral interests and social well-being of the parish, fall within the scope of such uses. These appear to be objects for the promotion of which the parish church may be employed, in so far as such employment of it does not interfere with the more sacred and important use of the building.

73. The benevolent scheme, however, must be local, not general, in its design; because the parish church is built and the heritors are bound to maintain it for the use not of the community at large, but of those members of it only who possess the status of parishioners within the district to which

(*a*) But see *infra*, Sect. 76, and cases there cited.

CHAP. V.

the church is attached. As a general rule, therefore, it may be stated that, to justify the use of the parish church for any other purpose than that of Divine worship, that purpose must be one which is ecclesiastical in its character and connected with the government of the Established Church; or a purpose which more or less directly partakes of an educational or charitable character, and is designed to promote the moral interests or social wellbeing of at all events a certain section of the parochial community (*a*). Perhaps the absence of this latter element, viz. utility to the parishioners, as well as the dubious sincerity of the terms of the notice of meeting, contributed to the decision in the case of *Easson v. Lawson*, just cited, where it was held that a public meeting to be convened "to explain the present position of the Church, and enforce her missionary and other schemes," was an illegal use of a (burghal) parish church, and interdict at the instance of a minority of the magistrates of Dundee was granted to prevent the use of the Steeple Church for this purpose, although such use had been sanctioned by the majority of the Town-Council.

Uses to which
church may
not be applied.

74. The parish church may not, of course, be used as a place of meeting at which doctrines are to be advocated which are hostile to the cause of religion or morality, or which are subversive of social order. Nor may the church be used for a purpose which, though in itself innocent or even laudable, is inconsistent with the primary object and sacred character of the building. Independently of the principle of the common law, which would exclude the church from being used as a place of merchandise or amusement, the holding of markets or fairs therein is expressly prohibited by the Acts 1503, c. 83, and 1579, c. 70, the provisions of which may be regarded as still in force (*b*).

Public Meetings, &c.

75. Although parish churches with us are not now con-

(*a*) On this subject generally, the reader is referred to the remarks contained in the opinions delivered by the Judges in *Easson v. Lawson*, 1843, 5 D. 1430.

(*b*) See per Lord Medwyn in *Kirk-Session of St. Andrew's Parish v. Magistrates of Edinburgh*, 1835, 13 S. at p. 394, foot.

secrated, yet the appropriation of the building as a church imports a dedication of it to use as the house of GOD, and so excludes it from the domain of commerce or from any common uses so long as it retains this sacred character (*a*). Hence, it would be improper to hold meetings connected with political or financial affairs within the church; or meetings of parish, district, or county boards, or justices of the peace; or even to use the church as a week-day school (*b*). All these are purposes purely or mainly secular in their character, and being so, appear inconsistent with the sacred character of the building. For a somewhat similar reason the use of the parish church as a place of meeting for municipal or parliamentary election purposes seems also objectionable (*c*). Various other objects might be mentioned immediately connected with the welfare and social economy of the parish, for the furtherance and consideration of which the parish church is not properly adapted, and for which its use would probably be refused, either on the ground that it was not the appropriate place to hold meetings in connection with such objects, or in respect that these were too secular in their nature.

76. Although not objectionable on the grounds last mentioned, the use by dissenters of the parish church is deemed inappropriate, and was prohibited in the case of *Urquhart* (*d*). Here the Court granted interdict at the instance of a single heritor against the use of the old parish church (although no longer used as the parish church) as a place of meeting for a Free Church congregation, although permission had been granted by a majority of the heritors. Consistently with the principle of this judgment, the ground on which in the early case of *Elgin* it was decided that the use of a portion of the Town Church buildings (*e*), called the Little Kirk, might be

Use of church
by dissenters.

Case of *Elgin*.

(*a*) See *Ersk. ii. 1, 8*,

(*b*) See per Lord President Boyle in *Easson v. Lawson*, 1843, 5 D. at 1434.

(*c*) See judgment in *Kirk-Session of St. Andrew's Parish*, *supra*.

(*d*) *Duke of Richmond v. Earl of*

Fife's Trustees, 1844, 6 D. 701. See *Wright v. Elphinston*, 1881, 8 R. 1025.

(*e*) Not the Cathedral, as erroneously stated in the report.

CHAP. V.

Principle of
rule as to use
of the church.

granted to an Episcopal congregation was that this portion of the building formed no part of what was the parish church (*a*).

77. The principle of the rule in regard to the use to which a parish church may or may not be applied seems referable not merely to the special purpose and sacred character of the building, but in part also to these two other considerations, viz.—(1) the nature and extent of the parochial burden which exists in connection with the maintenance of the building; and (2) the special class of the community for whose accommodation the building is provided, and to whose use it is devoted. The parochial burden in question, as laid on the heritors, is confined in its application to the repair and maintenance of buildings *qua* churches, and does not, in point of law, extend to the reparation of the building which is rendered necessary by its use for any other purposes. That dilapidation which is consequent on the use of the building for a different purpose or in a different character is not such dilapidation as the heritors are bound to make good (*b*).

Church in-
tended for par-
ishioners only.

78. Further, as a parish church is provided for the accommodation of the resident inhabitants of the parish, it cannot legally be applied to the use or accommodation of the public generally, because the heritors of the parish are in no way bound either to provide or keep in repair religious edifices on their account. At the same time, the general rule above expressed may be liable to suffer exception in cases of “extraordinary necessity.” Then, probably, the church might with propriety be put to more ordinary uses in connection with those requirements for its occupation which the particular occasion demanded. Thus, in the event of a fire, a war, or other public calamity, the church might with propriety be used for a purpose which, but for the exceptional occasion, would be unwarrantable.

Exceptional
uses justifiable.

(*a*) *Innes v. Minister of Elgin*, House of Lords, 1713, Robertson, 69, not reported in Court of Session.

(*b*) Per Lord Meadowbank in *Kirk-*

Session of St. Andrew's Parish v. Magistrates of Edinburgh, *supra*, 13 S. 394, top.

SECTION XVIII.—*In whom the Custody of the Parish Church is vested.* CHAP. V.

79. Judicial opinions to a somewhat different effect have been expressed on this subject. According to one view, the custody of the parish church seems to be in the minister, by virtue of the delivery formerly made to him by the patron of the keys of the church on his induction (*a*). On the other hand, the view has been expressed that the custody of the building is in the heritors, in virtue of the possession of the church keys by their servant the beadle (*b*). These views are not necessarily inconsistent. The minister may have the custody of the church regarded as a place of public worship, while the heritors may have the custody of it as a parochial building, and with a view to its due conservation and exemption from uses inconsistent with its legitimate occupation.

80. The minister and the kirk-session, as the natural guardians of the parish church in matters ecclesiastical, are the proper primary judges of the propriety or legality of any proposed use of the building, and are entitled to resist any improper use being made of it (*c*). In particular, their interference seems the more appropriate and becoming when such improper use of the building arises from, or is connected with, a purpose which is calculated to militate against the interests of religion or morality, or is inconsistent with the sacred character of the church. In regard to the conduct of Divine worship in the church, and the use of the church for that purpose, the minister has control. Nobody can hold a service or officiate at a service without his consent, or the authority of the Presbytery or a higher court of the Church.

(*a*) *Ibid.* per Lord Meadowbank, who in support of his opinion refers to the authority of Lord Preston-grange, and to the case of Craigdallie, which is probably that of Davidson *v.* Aikman, 27th June 1805, F.C., in House of Lords, *Craigdallie v. Aikman*, 1 Dow, 1; 5 Paton, 719; 6 Paton, 618, and 2 Bligh, 529.

(*b*) Per Lord Medwyn in Kirk-Session of St. Andrew's Parish *v.* Magistrates of Edinburgh, *supra*, 13 S. at p. 395.

(*c*) Kirk-Session of St. Andrew's Parish *v.* Magistrates of Edinburgh, *supra*, 13 S. 391.

Alternative view on the subject.

Who may vindicate proper use of the church.

Minister and Kirk-Session.

CHAP. V.

Heritors and
Magistrates.

81. Besides the minister and kirk-session, the heritors in a landward parish, and the magistrates on behalf of the inhabitants of a burghal parish or the burghal district, are also entitled to protect the church against use for an improper purpose, and to vindicate their rights and interests in its fabric. The cases of Dundee (*a*) and of Urquhart (*b*) imply this. Indeed, the latter case further supports the doctrine that a single heritor is entitled to resist an illegal use of the church. Here the old church had fallen into decay, and a new church was on a particular Sunday opened for public worship. On the day previous permission had been granted by all the heritors, save the complainer, to a Free Church congregation to assemble in the old church, and they obtained the keys from the beadle and took possession. The complainer presented a note of suspension and interdict against this use of the old church, which was granted by a majority of the Court on a passed note (*c*).

Presbytery's
right of inter-
ference.

82. As guardians of the rights and interests of the Church Establishment within their bounds, Presbyteries are entitled to prevent an illegal or unbecoming use of parish churches. Dissociated, as these ecclesiastical bodies are, from all proprietary or patrimonial rights in the building, they are pre-eminently qualified to act at once with impartiality and independence in vindicating its sacred character, and enforcing its becoming use. Should the minister and kirk-session of the parish on the one hand, or the body of heritors on the other, attempt to apply the church to an improper use, or

(*a*) *Easson v. Lawson*, 1843, 5 D. 1433, where Lord Ordinary Cuninghame says, "The latter (town-councils) in every view of their office and duties are *quasi* trustees for the community, and any trustee may demand an interdict against an unusual and inappropriate use of the corporate property."

(*b*) *Duke of Richmond v. Earl of Fife's Trustees*, 1844, 6 D. 701.

(*c*) While Lord Jeffrey dissented from the judgment, he did so on the

special ground that, in his opinion, the old building had ceased to be the parish church; that the only remaining interest in it, on the part of the complainer, was one of a patrimonial kind; and that no patrimonial injury was either averred or was likely to arise from the use of the building as aforesaid. Had his Lordship arrived at a different conclusion on this point, he would have concurred in the judgment.—See his opinion, 6 D. 703.

acquiesce in or fail to resist an attempt to do so, the Presbytery seems entitled to interfere. A doctrine to this effect was recognised in the case of Ruthven (*a*), where it was remarked that "The Presbytery is the permanent guardian and superintendent of the ecclesiastical establishments within its bounds, and in that character has a title to insist in any action which the exigencies of the case may require;" and also in the case of Gorbals (*b*) where it was laid down that "The Presbytery of the bounds have a title to use all the means which may be necessary in order to apply the parish church to its proper use."

SECTION XIX.—*Division of the Area of the Church among the Parishioners.*

83. The area of the parish church belongs to the body of heritors for the time being, for the use and accommodation of the individual heritors, their families, and tenants (*c*). In the case of a purely landward parish the apportionment of the area of the church is at once made among the individual heritors. In the case of a landward-burghal parish, there has generally been a division made, in the first instance, of the area between the two sections of the parish, and thereafter an allocation of the sittings in each portion of the area among the landward heritors on the one hand and the feuars or inhabitants of the burgh on the other.

To whom area in parish church belongs.

How apportioned.

84. The rule of the division of the area between these two sections of the parish seems to have been based on the principle of proportioning the amount of the space to that of the population (*d*). This rule was *in terminis* applied in the case of Forfar (*e*), and it is consistent with the principle

Rule of allocation in burghal-landward and urban parishes.

(*a*) Presbytery of Fordyce *v.* Shanks, 1849, 11 D. 1361, per Lord Fullerton, p. 1369.

(*b*) M'Dougall *v.* Blackie, 1863, 1 M.P. 503, per Lord President Inglis (then Lord Justice-Clerk), p. 508.

(*c*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 917.

(*d*) See per Lord Braxfield in *Earl of Home or Marchmont v. Heritors of Eccles*, 1776, 2 Hailes, 734; also reported *Mor.* 7924, App. *Kirk*, No. 2, and 5 Br. Supp. p. 558.

(*e*) *Ure v. Carnegie*, 1793, M. 929.

CHAP. V.

applied in the cases of Crieff (*a*) and of Peterhead (*b*), where it was, *inter alia*, ruled in the Court of Session that in a landward parish with an urban district the burden of rebuilding was to be divided between the rural heritors on the one hand and the feuars of the town on the other, in proportion to the amount of accommodation respectively required for the inhabitants of each, whilst the area was to be divided in proportion to the respective assessments; in other words, that both burden and division of area were to be in proportion to population. Although the interlocutors in the Peterhead case, *quoad* the rule of assessment adopted by the Court of Session, were on appeal reversed, it is not clear whether the judgment of the Court below, so far as it implied the apportionment of the church when built according to population, was disturbed. It is thought, however, that in all cases where the parish, though urban, contains no burgh, and is therefore legally landward, the allocation would now be found to fall to be made in proportion to the assessment.

Allocation
when parish
contains a
burgh.

85. In the case of a landward-burghal parish, it is competent to ignore the division of the parish into two districts with different characteristics, and to assess the whole of the owners of lands and heritages in the parish upon their real rents (*c*), and in this case the allocation of sittings must probably be made to each heritor individually in proportion to the amount of his assessment (*d*). This, however, is a branch of the law upon which it is difficult to lay down with confidence any general rules. The great majority of cases will probably be found to be ruled by the practice of the parish.

86. The usual mode of procedure in dividing the area of the church in a landward-burghal parish has been to set apart one portion of it for the body of landward heritors, and

(*a*) *Feuars v. Heritors of Crieff*, 1781, M. 7924.

(*b*) *Harlaw v. Merchant Maiden Hospital*, 1802, 4 Paton, 356, not reported in Court of Session.

(*c*) *Stephen v. Anderson*, 1887, 15 R. 72.

(*d*) But see reservations on this point in opinion of the Lord Justice-Clerk in *Downie v. Magistrates of Annan*, 1879, 6 R. 457.

to allocate the other portion to the magistrates for behoof of and as representing the burgh, leaving it for them to subdivide such portion afterwards among the different members of the burghal community, according to their respective rights and interests. Where this mode of division, which is that pointed at in the case of Kinghorn (*a*), and is consistent with the *dicta* expressed in that of Lanark (*b*), is adopted, it seems to imply the recognition of the burgh as one heritor (*c*), and an apportionment to the magistrates, *qua* trustees for the community, of that share of the area which is set apart for their accommodation.

87. While law recognises a right on the part of parishioners generally to obtain accommodation in the parish church at the diets of public worship, reasons of convenience and propriety require that this right should be exercised in conformity with a permanent arrangement in the occupation of seats in the church. Such an arrangement is secured by an allocation of the sittings in the church on behalf of the parishioners. In landward parishes this allocation is made directly to the several heritors for behoof of (1) themselves and their families, and (2) their tenants and the residenters on their lands. Two elements come into play in effecting this allocation, viz. 1st, the order of choice on the part of the heritors in the selection of seats; and 2nd, the amount of seat accommodation apportionable among them respectively. In regard thereto, the principle of division in a landward parish (including, it is thought, as explained above, an urban but non-burghal parish) is that the heritors have a right of choice in selecting seats for their families, or family pews, according to the rent (real or valued,

Rule of allocation in landward parishes.

(*a*) Sinclair *v.* Magistrates of Kinghorn, 1761, M. 7918. Cf. Heritors *v.* Magistrates of Kinghorn, 1897, 24 R. 704.

(*b*) Per Lord Justice-Clerk Boyle in Lockhart *v.* Lockhart, 1832, 10 S. at p. 247.

(*c*) See also Duke of Argyle *v.*

Rowat, 1775, M. 7921, which was cited by Lord Fullerton in Clapperton *v.* Magistrates of Edinburgh, 1840, 2 D. at p. 1417, as recognising this principle. Cf. Downie *v.* Magistrates of Annan, *cit.*, and Stephen *v.* Anderson, *cit.*

CHAP. V.

as the case may be) of their respective estates (*a*); and after such allocation of family pews has been made, they have a choice, on a similar principle of preference, of portions of the area of the church as sittings for their tenants—the amount of space allocated for family pews being in all cases taken *in computo* in calculating the *quantum* of area to which any one heritor is entitled (*b*).

Allocation to
tenants.

88. Each heritor may apportion among his tenants the share of the area allocated to him on their behalf, under this proviso, that he cannot deprive any tenant on his lands of a seat in the church, if there be room for him. But it is in the heritor's power, as trustee for his tenants, to decide where the seat of each shall be (*c*).

SECTION XX.—*Allocation of Sittings for Heritors and their Tenants, and others.*

Heritor's right
to a family
pew.

89. While the allocation to a heritor of a separate or family pew is perhaps rather a privilege or honorary distinction awarded to him than a matter of abstract right, it is an arrangement which is in accordance with reasons of social convention, is supported by long inveterate usage, and has frequently received judicial recognition (*d*). Assuming, therefore, that the enjoyment of this privilege on the part of one heritor does not prejudice the higher and more important right to accommodation on the part of other heritors, the claim to a family pew is one to which each heritor in a landward parish seems entitled in proportion to his rent (*e*).

(*a*) "A division of a church must be according to the valued rent,"—per Lord President Dundas in *St. Clair v. Alexander*, 1776, 2 Hailes, 720. Per Lords Braxfield and Alva in *Feuars v. Heritors of Crieff*, 1781, 2 Hailes, 898, 3. The rent must be the "valued" rent only when that is the rule of assessment. When the assessment is according to the real rent, the division will be according to the real rent.

(*b*) *Earl of Marchmont v. Earl of*

Home, 1776, 2 Hailes, 734, M. 7924; and *Kirk*, Appx. 2, and 5 Br. Supp. 558.

(*c*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, *supra*, 6 S. at p. 917, foot. See also *per curiam* in *Earl of Marchmont v. Earl of Home*, *supra*. *Reid v. Ferguson*, 1893, 9 S.L.R. 232.

(*d*) See per Lord Fullerton in *Walker v. Earl of Zetland*, 1848, 10 D. at p. 1383.

(*e*) See *per curiam* in *Earl of Marchmont v. Earl of Home*, *supra*.

90. In regard to the dimensions of the pew which, *qua* family pew, is to be allocated to the heritor, the general principle seems to be that while its size is not necessarily limited to the actual number of the members of his family, neither is it to be enlarged solely in proportion to the amount of his rent, irrespective of the amount of accommodation actually required. Taking, however, the heritor's valuation as the test of his wealth and position, and these as indicative of the style of his establishment, the size of a family pew which an heritor possessing a large rent will be entitled to select is one the accommodation of which will be sufficient for his family. This term, as here used, is exclusive of servants, but it is held to include the average number of visitors who, it may be assumed, will from time to time be resident in the heritor's house (*a*).

CHAP. V.

Size of family pew.

91. On this principle the allocation of sittings and family pew was made in the case of Polmont just cited. Here the *cumulo* valuation of the parish was £6052 : 0 : 7 Scots. Of this sum, the valuations of Lord Zetland and Mr. Drummond—the two largest heritors—were £1408 : 10 : 8 and £1234 : 16s. respectively. The two next highest valuations amounted to £402 : 18 : 10 and £363 : 16s. The Court sustained as reasonable, and at the same time ample accommodation a family pew containing thirteen sittings to each of the two larger heritors. In the matter of accommodation, the conjunction or separation of sittings by division into pews seems to be treated as an artificial arrangement merely, which, even in the allocation of family pews, is not to be arbitrarily given effect to against the convenience of those who are entitled to be accommodated in the church. Hence, “if there are not seats “in one pew, there seems no reason for giving up the whole “of the next. Two or three sittings may be taken, and thus

Case of Polmont.

Pews an arbitrary division of area.

(*a*) “For it seems reasonable to “take into consideration, and hold “as part of the family, not only wife “and children, but the usual, and “even occasional, inmates of a prin-

“cipal heritor's family,”—per Lord Ordinary Cuninghame in *Walker v. Earl of Zetland*, *supra*, 10 D. at p. 1381.

CHAP. V.

Heritor's right
to sittings for
his servants
and tenants.

"the whole heritors may be accommodated in their order,
"beginning with those who have the largest valuation" (a).

92. Besides a seat for himself and his family, each heritor, *qua* owner of lands within the parish, is entitled to an allocation of sittings for his servants and tenants. The *quantum* of the space is, in a landward parish, dependent on the amount of the rent of his lands and the size of the church. While the right in question is derived from the fact of heritable ownership, it is to be kept in view that its exercise is presumed to co-exist with the actual use of the church by the heritor and his tenants. It is suggested by Mr. Duncan that when such use has been completely abandoned by them for a long period, and accommodation has been acquired by them in another parish church, it may be doubtful whether heritable ownership will entitle the heritor to reassert possession of his former sittings—at least if these have in the meantime been occupied by persons who have become resident in the parish, and there is no vacant room in the church. A principle to this effect seems to be recognised in the case of Monzie, which, however, is very special (see *supra*, p. 114) (b); and certain judicial *dicta* in the case of Hamilton (c) seem to imply that long possession, coupled with actual occupation of seats in a church, may support a right to retain them, even in the face of a more formal title. In this case the seats were in a loft or gallery, and there may possibly be a difference between the rule to be applied in the case of a claim to a gallery and that to be applied in the case of a claim to part of the area (d).

93. While the right to demand an allocation of seats in

(a) Per Lord Jeffrey in *Walker v. Earl of Zetland*, *supra*, 10 D. at p. 1384.

(b) *Drummond v. Heritors of Monzie*, 1773, M. 7920, and Session papers, 22 Campbell's Coll. No. 60. In *Sinclair v. Magistrates of Kinghorn*, 1761, M. 7918, it is remarked: "What the Lords chiefly regarded

"in the question about dividing the
"area (of the church) was the immemorial possession."

(c) Per Lord Justice-Clerk Hope in *Magistrates of Hamilton v. Duke of Hamilton*, 1846, 8 D. at p. 849; *affd.* 7 Bell, 1.

(d) *St. Andrews Case*, in *Connell Par. App.* p. 79.

the church is, as a general rule, correlative to the obligation to repair the building, inveterate usage entitles the minister of the parish to a pew for himself and his family (*a*). The pew so assigned to him is generally near the pulpit. A pew or row of seats round or near the foot of the pulpit is also ordinarily set apart for the use of the elders; and Dunlop remarks that "some seats, generally those which occupy the place of the communion tables, are usually appropriated for the poor" (*b*). In *quoad sacra* churches, under 7 and 8 Vict. c. 44, section 8, one pew is, by section 9, to be provided rent free for the use of the minister's family, and another for the officiating elders.

CHAP. V.

Seats for
minister,
elders, and
poor.

94. He who possesses merely a right of superiority in the parish does not seem entitled to demand a seat in the church (*c*); and notwithstanding the case of Torphichen (*d*), which has been relied on as establishing a different doctrine (*e*), it may be doubted whether a similar rule did not also apply to the patron and the titular. In the case just mentioned, Lord Torphichen, who was a patron and titular, was superior of a considerable part of the lands in the parish, and was also proprietor of a certain although a small amount of them. He was thus a heritor of the parish, as well as patron, titular, and superior; and he claimed the allocation of a particular open loft in the new church, on the ground of the former immemorial possession by his family of a loft in the old church of similar or nearly similar size. Former occupancy, and not the possession by him of the character of patron and titular, coupled with the fact that he was a heritor of the parish, was the *sole* ground on which he claimed the

Superior not
entitled to a
seat.

✱

Case of
Torphichen

(*a*) Dunlop, Par. Law, 3rd ed. p. 41, s. 63.

(*b*) *Ibid.*

(*c*) In *Dundas v. Nicolson*, 1778, M. 8511, Lord Braxfield says, 2 Hailes, 802: "They who have only a right of superiority have no share in the division of the church. The superior is not entitled to set his

"foot within the church, or even within the parish."

(*d*) *Torphichen v. Gillon*, 1765, M. 9936.

(*e*) See *Connell Par.* p. 545, foot and over, and *Supp.* 74; *Ersk. i.* 5, 13; and per Lord Cringletie in *Macdonell v. Gordon*, 1828, 6 S. at p. 606.

allocation of the loft (*a*). Accordingly, he strongly founded on the circumstance that this was but the case where the old church was restored, and substantially admitted that he could not have made such a claim in connection with a church built for the first time. What was really ruled by this case seems to have been, that when a heritor was *also* patron he was entitled to priority of choice in the selection of a family pew over a heritor merely whose valuation was greater than his own (*b*).

SECTION XXI.—*Procedure in Division of the Area of the Church.*

In whom right to make division vested.

95. To give practical effect to the right of occupation of the church in favour of those who are entitled thereto, a division of the area or an allocation of the sittings of the church requires to be made (*c*). In the case of a landward parish, the right and corresponding obligation to make such a division or allocation rests with and on the heritors, as opposed, for instance, to the minister or kirk-session (*d*), or the general body of the parishioners (*e*). A similar principle appears to apply in the case of a burghal-landward parish, *quoad* the allocation of that portion of the area which is assigned to the rural district. On the other hand, in those

(*a*) Thus, it is pleaded for his Lordship, "He was possessed of the only loft, which was the most respectable seat in the old church, and agreeable to that possession he is claiming what he considers to be the most respectable seat in the new church." He did not rest his demand on the ground that he was either patron, or titular, or both. On the contrary, this plea never seems to have been seriously maintained by him, for not only is it not relied on at all in his pleadings, but the following very important passage occurs in the "Information" for Gillon:—"And with regard to the point of law in general, it seems to be taken for granted on all hands that the

"patron of a parish *qua* such has no title whatever to a seat in the church."—See Session papers, 78 Arniston Coll. No. 8.

(*b*) This seems to be in accordance with the facts of the case, and the construction put on the decision in *Earl of Marchmont v. Earl of Home*, cited in next note.

(*c*) "Good order requires a division,"—per Lord Hailes in *Earl of Marchmont v. Earl of Home*, 1776, 2 Hailes, 734, M. 7924, App. *Kirk*, No. 2, and 5 Br. Supp. 558.

(*d*) See *Heritors v. Minister of Falkland*, 1739, M. 7916.

(*e*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 917.

cases where the magistrates act as a single heritor for the whole burgh, the division or allocation of the portion of the area assigned to the burghal district appears to be vested in the magistrates (*a*), who distribute the sittings among the inhabitants *qua* tenants of the burgh, according to their respective rights and interests. When a division of the church has been made by the heritors or by the magistrates it may be judicially approved of by the Sheriff at the suit of those having interest, such as a heritor or his tenants (*b*).

Extrajudicial
division.

96. When no extrajudicial division has been made and acquiesced in, parties interested may demand a judicial division. This demand is made either in the form of a petition or of a summons; and the process is generally insisted in before the Sheriff *qua* Judge Ordinary of the bounds (*c*). In the old case of Easter-Crichton (*d*) the jurisdiction of the Presbytery, subject to review by the Civil Courts, seems to have been recognised in the matter, but this is not now law. An action for the allocation of the seats in the church is conveniently and usually brought on the occasion of the church being rebuilt or enlarged, as the suitable arrangement and apportionment of the sittings throughout the entire area of the church can then be most conveniently adjusted. As a general rule, however, a heritor is entitled to insist at any time in a judicial division (where there has been none before, and no extrajudicial division properly carried out, and subsequently acquiesced in (*e*)), in so far as this is necessary to vindicate his right to the occupancy of particular seats for himself, his family, or tenants (*f*). A heritor is not entitled to

Judicial
division before
the Sheriff.

(*a*) See Sinclair *v.* Magistrates of Kinghorn, 1761, M. 7918. *Cf.* Heritors *v.* Magistrates of Kinghorn, 1897, 24 R. 704; Downie *v.* Magistrates of Annan, 1879, 6 R. 457.

(*b*) In Skirving *v.* Vernor, 1796, M. 7930, the petition to the Sheriff was at the instance of two of the tenants of the Earl of Wemyss with his Lordship's consent.

(*c*) Thus, the proceedings for the division of the church originated

before the Sheriff in Duke of Argyle *v.* Rowat, 1775, M. 7921; Earl of Marchmont *v.* Earl of Home, *cit.*; and Walker *v.* Earl of Zetland, 1848, 10 D. 1378.

(*d*) Bird *v.* Justice, 1693, 4 Br. Supp. 77.

(*e*) See Mitchell *v.* Barr, 1886, 3 Sheriff Court Rep. 297.

(*f*) See per Lord Craigie in Smith *v.* Crawford, 1826, 4 S. at p. 739.

CHAP. V.

demand a reallocation merely because the church has been reseated, at all events when the amount of his own accommodation has not been interfered with (*a*). But though there is no right to a reallocation, it may be necessary to make a proportional redistribution of the sittings.

Nature and
effect of the
right.

97. The right to demand an allocation inherently belongs to the heritor (*b*); and he will not be barred from exercising it in the face of adverse possession even for the prescriptive period, unless such possession be attributable either to a judicial decree of division, or to an agreement, actual or constructive, which is binding upon him; for mere possession without a title cannot found a right (*c*). This doctrine was recognised and given effect to in the case of *Aberdour*, just cited; and in the cases of *Dalry* (*d*) and *Hamilton* (*e*) the prescriptive possession had followed on, and was attributed to special agreement. In the case of an old church, when heritors have from time immemorial enjoyed possession of certain pews, there may be a presumption that the seats were allocated (*f*). In considering a heritor's demand for a given allocation of seats, past possession is a most material element; and in proportion to the length of the period over which it extends will affect, favourably or otherwise, the claim preferred. In the case of *Kinghorn* (*g*) the Court disposed apparently of the question raised on the footing mainly, if not solely, of immemorial possession.

Importance of
past possession.

Form of action
when not
possession
merely.

98. When, as is sometimes the case, a demand for a reallocation of the whole or a portion of the area of the church is rested upon an alleged right of property in a particular pew or part of the church, or when the result of a

(*a*) *Stiven v. Heritors of Kirriemuir*, 1878, 6 R. 174.

(*b*) *Ersk.* ii. 6, 11.

(*c*) Per Lord Ordinary *Moncreiff in Wemyss v. Earl of Morton*, 1838, 16 S. at p. 333, foot.

(*d*) *Smith v. Crawford*, *supra*, 4 S. 738.

(*e*) *Magistrates of Hamilton v.*

Duke of Hamilton, 1846, 8 D. 844; *affd.* 7 Bell, 1.

(*f*) *Cathcart v. Weir*, 1785, M. 7928; *Abercorn v. Presbytery of Edinburgh*, 1870, 8 M'P. 733.

(*g*) See *Sinclair v. Magistrates of Kinghorn*, 1761, M. 7918. *Cf.* *Heritors v. Magistrates of Kinghorn*, 1897, 24 R. 704.

division, if made, would be to invert a long-continued adverse possession, the action should not be brought in a summary form, as by petition (*a*). When a question of heritable right is involved, or a formal adverse scheme or decree of division exists which ought to be set aside, the appropriate action will be one of declarator or reduction brought in the Court of Session (*b*). The judgments pronounced by the Sheriff in processes for the division of the church are subject to review by the Court of Session, either by way of suspension and interdict (*c*), or—instead of, as formerly, by advocacy (*d*), which is now abolished—by way of appeal (*e*). Where under a special agreement the church had been excambed for a new one, it was held that the heritors, including the heritors of lands disjoined *quoad sacra*, were entitled to the same allocation in the new church as they had enjoyed in the old (*f*).

SECTION XXII.—*Nature of right to and power of disposal of Seats in the Church.*

99. The nature of the rights of the heritors in the accommodation in the parish church are thus explained by Lord President Inglis in the Jedburgh case (*g*):—

Lord President Inglis' definition of heritor's right.

“The heritors have the burden which is imposed by statutes of building and maintaining parish churches, as well as other ecclesiastical buildings, and the buildings which they so build and maintain are in law the property of the heritors. But I need hardly add that they are only property in trust—in trust, that is to say, for the whole body of the parishioners within the parish; and when in the division of the area among the heritors the accommodation in the parish church comes to be appropriated, so much to one heritor and so much to another, I think, in like manner, each individual heritor becomes trustee for those of the parishioners who reside upon his estate. The portion of the area

(*a*) See *Smith v. Crawford, supra*, 4 S. 738.

(*b*) See *Magistrates of Hamilton v. Duke of Hamilton, supra*, 8 D. 844, affd. 7 Bell, 1, where an action of reduction and declarator was brought.

(*c*) As in the case last cited.

(*d*) As in *Earl of Marchmont v.*

Earl of Home, supra; *Wemyss v. Earl of Morton*, 1838, 16 S. 332; *Walker v. Earl of Zetland*, 1848, 10 D. 1378.

(*e*) In terms of 31 and 32 Vict. c. 100, ss. 64 and 65.

(*f*) *Roxburghe v. Miller*, 1875, 3 R. 728, reversed 4 R. (H.L.) 76.

(*g*) *Ibid.* 3 R. at p. 734.

that is assigned to him is not his property in any sense of the word. The heritors are joint proprietors of the parish church itself in trust, as I said already; but the portion of the area that is assigned to each heritor is given to him not to be occupied exclusively by himself and his family—not to be shut up, for that is illegal (*a*)—not to be hired out for money, for that is equally illegal (*b*)—but to be used for the benefit of the parishioners who are resident upon his estate; so that each individual heritor, after the division is made, is equally a trustee for a portion of the parishioners as the whole heritors, before the division was made, were trustees for the entire parish. Now I do not at all doubt that both the burden and the right of the heritors in this matter are civil burden and civil right, and fall to be adjudicated upon by civil jurisdiction only.”

It is a popular understanding of the law that after the bell has ceased ringing unoccupied seats are free to any person who desires to worship in the church (*c*). It is thought, however, that a person who has a sitting of his own which he is entitled to occupy cannot, if it be unoccupied, insist upon entering somebody else’s pew, which is partially occupied. Nor, it is thought, can a stranger or other person without a sitting of his own insist upon choosing a particular pew if a suitable sitting is indicated to him by the church officer or other person in charge of the provision of accommodation.

Right consequent on heritorship.

100. A heritor’s right to the occupation of seats in the parish church is derived from the ownership of lands within the parish. Its extent is proportioned to that of the valuation of these lands, and forms an adjunct of his ownership therein (*d*). Accordingly, the right in question passes with

(*a*) The cases of *M’Crone v. Campbell*, 1826, 5 S. 42; *Dobbie v. Halbert*, 1863, 1 M’P. 532, touch this question, but both these cases turn upon technical points. Family pews are sometimes kept locked, and it has never been determined that this is illegal where there is ample other accommodation in the church.

(*b*) This proposition may perhaps be subject to a slight qualification, as explained *infra*.

(*c*) The writer has been told by an old man that on one occasion, early

in the nineteenth century, the writer’s grandfather was applied to as a magistrate in Tulliallan church for a warrant to remove a man from Lord Keith’s pew, which was otherwise unoccupied. The warrant was refused on the ground that the bell had ceased ringing. There may have been other good grounds for refusing the warrant, but the fact that this was the reason assigned is an illustration of the popular understanding.

(*d*) Ersk. ii. 6, 11; Bank. ii. 8, 192; Bell’s Prin. 744.

the lands as a pertinent, though not specially conveyed. The family pew will pass or remain, as the case may be, with the larger portions in valuation of the land (*a*). Hence, a heritor cannot, as a general rule, dispose of his estate within the parish and yet retain possession of the area of the church allocated to him, or to his author, *qua* proprietor of the estate (*b*). Accordingly, the heritor cannot dispose of his seat in the church separately from his lands. It is annexed to and cannot be dissevered from them (*c*). The rule applies to a seat legally allocated to a house in burgh (*d*). Accordingly, when the lands of a heritor to whom a portion of the area of the church is allocated come to belong to different proprietors, each disponent is entitled to such a share thereof as corresponds to the extent of the land acquired by him. This was so ruled in the case of Lasswade just cited, where this further rule was applied, viz., that when no evidence or presumption of a regular division of the area exists the actual state of possession by the two disponents at the time will be given effect to, until either a legal division of the area be made, or a rateable appropriation between them effected of that part of it which formerly belonged to their common author.

Church seat
pertinent of
the estate.

101. On a similar principle, suitable accommodation in that part of the area of the church which is appropriated to the heritor is held to be communicated to the tenant under the lease of his lands, the extent of the accommodation being proportioned to the amount of the rent payable for the farm. Thus, in the case of Inveresk (*e*) it was found that two tenants of the Earl of Wemyss, whose leases commenced as from 1792, were entitled to accom-

Seats for
tenants.

Case of
Inveresk.

(*a*) See *Lithgow v. Wilkieson*, 1697, M. 9637; *Duff v. Brodie*, 1769, M. 9644; *Peden v. Magistrates of Paisley*, 1770, M. 9644.

(*b*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 918, top.

(*c*) Per Lord Monboddo in *St. Clair v. Alexander*, 1776, 2 Hailes, 720.

(*d*) *Stephen v. Anderson*, 1887, 15 R. 72.

(*e*) *Skirving v. Vernor*, 1796, M. 7930.

CHAP. V.

modation in the area of the church allocated to his Lordship as heritor, adversely to another tenant whose lease was then current, and to whom, at its commencement, express permission in writing was granted to possess and sublet during the currency of the lease the whole of his Lordship's property in the church, in return for an obligation on the tenant's part to keep it in repair. Here the leases of the lands to the pursuers were granted with "all liberties and freedoms belonging thereto." But the Court's judgment does not seem to have proceeded on this as a specialty; and from the result of the case, it may be doubted whether a landlord could, under an express agreement with one tenant, exclude another tenant, without his consent, from demanding the use of that portion of the area allocated to the landlord which corresponded to the extent and value of the farm let. A tenant, however, is not necessarily entitled to the same seat as that possessed by a previous tenant under a prior lease of the lands, but only to a sufficient seat, which it is the landlord's duty to assign (*a*).

Right to let
seats in land-
ward parish
church.

102. Whether an individual heritor, or the body of heritors, can legally let seats in a landward parish church for rent does not seem to have been directly decided (*b*). The question involves two points, viz. (1) the abstract right to let such seats for hire or rent under any circumstances; and (2) the right to do so in exceptional cases, provided that the rent obtained be applied in a particular manner. The right to accommodation within the church on the part of the parishioners seems to be of such a nature as to render it incompetent for the heritors to deal with the seats, by letting them or otherwise, so as thereby to exclude the parishioners from the use of the church. A doctrine to this effect is indicated in the case of North Leith (*c*), where

Case of North
Leith.

(*a*) *Kinnaird v. Mathewson*, as reversed in House of Lords, 1802, 4 Paton, 429, not reported in Court of Session. See *supra*, p. 161.

(*b*) See a weighty *dictum* upon this

matter in the passage quoted *supra*, Sect. 99.

(*c*) *Gavin v. Trinity House of Leith*, 2nd June 1825, F.C. This case is very special.

the possible existence and exercise of the right of letting seats was expressly confined to such seats as were not required for the immediate accommodation of the parishioners, qualified by the further condition that the rent obtained should be applied for the relief of the poor^(a). It was also here remarked that, "though an individual heritor might in like manner let that part of his seat for which he had no immediate occasion, it was not in the power of the heritors, or any of them, either to shut up their seats or to let them to strangers, if any of the parishioners required accommodation, and least of all to transfer their right to individuals having no property in the parish"^(b). It may further be doubted whether a heritor could effectually let his seat for a period of endurance beyond his own life or proprietorship, as doing so would interfere with the right of his successor in the use of a subject which is an adjunct of the lands. Assuming that the heritors are entitled to let for hire seats in the church which are not required for the use of the parishioners, the judgment pronounced and judicial dicta expressed in *Clapperton v. Magistrates of Edinburgh*^(c) imply, if they do not practically decide, that the heritors cannot make a profit of the rent derived from seats so let, but must apply such rent to the support of the poor, or to some other appropriate pious use within the parish. In this case one of the Judges remarks: "I do not enter into questions concerning rights of heritors in landward parishes. It seems generally admitted that they cannot levy seat-rents for their own benefit, though there may be special cases of contract"^(d). Whether the application of such seat-rents toward the repair and maintenance of the parish

Seats—
Application of
rents.

(a) See per Lord Craigie, *ibid.* See also the case of St. Andrews reported in Connell Par. Appx. p. 79, and Hume's Session papers, May and June 1791.

(b) From the remarks by the reporter in *Farie v. Leitch*, 2nd Feb.

1813, F.C. it might appear that the right of the heritors to let seats in the church was assumed, but the case was very special.

(c) 1840, 2 D. 1385.

(d) Per Lord Moncreiff, *ibid.* 2 D. at p. 1424.

CHAP. V.

In burghal-
landward
parishes.

church be an appropriate use has not been decided, but it is thought that it would not be legal to apply such seat-rents in relief of any legal obligation of the heritors of a landward parish.

103. If the heritors in a purely landward parish can let the church seats for hire, so far as not otherwise occupied, and on condition that the rents are devoted to pious uses, this seems to imply the possession of a similar right on the part of the rural heritors in regard to those seats which are embraced within the portion of the church allocated to them in the case of a burghal-landward parish (*a*). On a similar principle the magistrates or the community appear entitled under similar conditions to let for hire the seats of that portion of the church which is allocated to them. This right is indirectly supported by the authorities and principles afterwards referred to in connection with churches in purely burghal parishes, and is said to have been affirmed by the case of Inverness (*b*), where the parish was burghal-landward. In this case, however, there had been a special agreement when the church was built, and the case is otherwise very special.

SECTION XXIII.—*Maintenance and Management of Burgh Churches.*

Maintenance
of burgh
churches
matter of
arrangement.

104. The remarks hitherto made principally, if not exclusively, relate to the churches of landward and burghal-landward parishes. In burghs the usual practice was for the community to build, or at least to fit up, churches for themselves, either out of their own funds or by subscription, and to indemnify themselves, in whole or in part, by the rent derived from letting the seats. In this way the maintenance

(*a*) In *Feuars v. Heritors of Crieff*, 1781, M. 7924, Lord President Dundas says, 2 Hailes, 893, "the Court can give no authority as to 'letting the seats.'" It has been suggested that this implies that a burghal-

landward church was on a special footing, but Crieff was not a burghal-landward parish, but a landward parish with an urban district.

(*c*) *M'Intosh v. Fraser*, 1825, 3 S. 508.

of the church in a purely burghal parish, as well as the rights of the inhabitants to its use, are matters which are governed less by the rules of statute law than by the provisions of contract or arrangement (*a*). While it might hence perhaps be argued that the interference of Presbyteries to compel magistrates to repair, enlarge, or rebuild burgh churches was excluded, the opinion of Lord Moncreiff in the case of Stranraer (*b*) is negative of this view.

105. Here, as it seems, the parish was regarded as purely burghal; and although the charge for payment of assessment connected with the building of the church was, on technical grounds, suspended, it was plainly not treated as incompetent from want of jurisdiction on the part of the Presbytery (*c*). In this case the opinion was indicated, that when there were no corporate funds the magistrates might assess the proprietors within burgh at their discretion; and that, failing this, the Presbytery might "give a warrant to attach any "property making part of the burgh, leaving the proprietor to "his relief" (*d*). These propositions must, however, be received with caution in view of the paucity of authority. A burgh cannot defray its ordinary debts in this way. In the case of Kilmarnock (*e*) it was held not *ultra vires* of the magistrates of a burgh of barony to apply part of the common good toward the endowment of a parish church within its territory. While it is generally in connection with the churches of purely burghal parishes that an agreement of the nature above alluded to exists, the case of Inverness noticed above (*f*), is an example of such an arrangement between the magistrates and certain of the heritors of a burghal-land-

Import of case
of Stranraer.

Case of
Kilmarnock.

(*a*) See *per curiam* in Clapperton v. Magistrates of Edinburgh, 1840, 2 D. at p. 1402 *et seq.*

(*b*) M'Neel v. Robertson, 1836, 14 S. 849.

(*c*) For it was here laid down, per Lord Ordinary Moncreiff, 14 S. at p. 851, that if the Corporation, who were treated as the heritors, refused

to assess themselves, the Presbytery might do so.

(*d*) Per Lord Ordinary Moncreiff, 14 S. 851, footnote.

(*e*) Magistrates of Kilmarnock v. Aitken, 1849, 11 D. 1089.

(*f*) M'Intosh v. Fraser, 1825, 3 S. 508.

CHAP. V.

ward parish which was given effect to by the Court, whereby the rights of parties at common law were to some extent affected and altered.

Seats allocated
to the
Magistrates.

106. In the allocation of seats in a burghal church the magistrates seem entitled, as an honorary distinction, to the first choice; and generally one or two of the most conspicuous and spacious pews are assigned to them. As such churches are not included within the scope of the enactments which impose on heritors the burden of maintaining churches, the result is, that where no special fund has been given or bequeathed for the purpose, or in so far as such fund, if any, is insufficient, the expense of maintaining the building may be defrayed from seat rents. Accordingly, it seems to be quite fixed that seats in a burghal parish church can competently be let for hire (*a*). A practice to this effect has long existed within most of the burghs in Scotland. Its legality was assumed, if not recognised, in the case of *Greenock* (*b*), and substantially decided by the judgment pronounced in *Clapperton v. Magistrates of Edinburgh* (*c*), read in connection with the judicial

Seats may be
let for hire.

opinions there expressed. The money derived from this source ought to be applied in defraying proper repairs and alterations on the building, and providing what is necessary for the due celebration of public worship within it. Rent may not be levied in order to increase the revenue of the burgh, or pay its ordinary debts or expenditure, and it ought to be exclusively applied toward the purposes above mentioned; it seems only to the extent to which it is so

How the seat-
rents may be
applied.

(*a*) So wrote Mr. Duncan, and the unsatisfactory case of *Mackay v. Wood*, 1889, 17 R. 38, referred to below, does not appear a reliable authority to qualify the proposition.

(*b*) *Magistrates of Greenock v. Greenock Gardeners' Society*, 1822, 2 S. 44. Here the church, with its sittings, had been constructed by the magistrates of the burgh under a special contract with the inhabitants to pay rent for their seats.

(*c*) *Supra*, and see the opinions of the Judges, 2 D. 1394 and 1402 *et seq.* Here the Tolbooth Church, made over to the magistrates by the Crown in 1566, without seats, was afterwards fitted up by them with seats, under an arrangement with the inhabitants in 1639, in terms of which the magistrates borrowed the necessary funds, to be repaid out of the seat-rent, and which rent was levied by them for upwards of 200 years.

required that the magistrates are entitled to exact seat rent (*a*). CHAP. V.

107. While, in point of strict law, the inhabitants of the burghal parish may have a prior claim to the occupancy of the seats in the church over non-parishioners, this principle of allocation is not, in point of fact, much attended to in the letting of the seats of burghal churches in large towns. The right to the occupation of seats in such churches is not, as in landward parishes, directly associated with the possession of particular lands within the parish (*b*). The right does not form an adjunct of heritable proprietorship. It is necessarily dependent rather on the principles and rules of contract; and this circumstance tends to exclude seats in a parish church within a burgh from the category of subjects *extra commercium*. A right on the part of the magistrates to sell as well as to let such seats seems to have been recognised in *Watson v. Watson* (*c*), but the point was not directly raised, and the report is an unsatisfactory one (*d*). Both here and in the case of Inverness (*e*), the personal title to the church seats was granted to persons either resident in or possessed of heritable property within the parish; and from the judgment in the latter case it appears that the fact of M'Intosh being a heritor of the parish was relied on as an element of importance. On the other hand, where the kirk-session of a burghal-landward parish had acquired by purchase certain seats which had belonged to certain moribund trade guilds, and had by them always been let, it was held that the kirk-session was not entitled to let them and to exclude other parishioners than the lessees, even although the rents were to be applied entirely to cleaning and keeping in good order the pews in question (*f*).

(*a*) *Ibid.* per Lord Justice-Clerk Boyle and Lord Gillies, pp. 1408 and 1411.

(*b*) The distinction now alluded to was founded on in *Duff v. Brodie*, 1769, M. 9644.

(*c*) 1760, M. 5431 and 7917.

(*d*) See the remarks of Lord President Hope on hereditary seats, at 2 D. 1405.

(*e*) *Supra*, p. 164.

(*f*) *Mackay v. Wood*, 1889, 17 R. 38. This is a very unsatisfactory case, as it leaves the legal position in regard to the pews in question quite undetermined.

Allocation of seats in burgh churches.

Such seats not *extra commercium*.

CHAP. V.

108. Two cases have occurred under the exceptional legislation dealing with the churches of Edinburgh and Montrose. It has been found that a statutory right to seat-rents infers a right to the revenue from all sitting accommodation in the church, whether pews or chairs (*a*). Again, it was found that where a statutory assessment was imposed upon the ownership of sittings, and was fenced with a claim of forfeiture, the owner of the sittings, being in arrear with his assessments, was not entitled to insist upon the forfeiture being enforced, and must pay, and continue to pay, his assessment (*b*).

SECTION XXIV.—*Rights to Church Seats quoad Succession.*

Seat in land-
ward parish
church
heritable.

109. In the case of landward parishes, where the heritor's seat in the church is allocated to and held by him as part and pertinent of his lands, it would seem to follow that his right thereto is heritable in its nature, and that on his death it passes to his heir-at-law or of provision succeeding to the lands. The cases already cited seem to exclude any severance of the seat in the church from the ownership of the lands in respect of which it was allocated. Consequently, the right to take it on the death of its former proprietor or allottee is perhaps to be ascribed to the right rather of ownership than of heirship on the part of the deceased heritor's successor. It was formerly not unusual for the heritor to fit up his own family pew on the portion of the area allocated to him, and to deal with the boarding and materials of which the seats were composed as his own absolute property, of which he could dispose in any way he pleased (*c*). Law, however, seems now to regard the seating of the church generally rather as a fixture, and as an integral part of the building (*d*); and, save in very special cases, it may perhaps be doubted whether, although an heritor did expend money in fitting up

(*a*) Edinburgh Ecclesiastical Commissioners v. Kirk-Session of St. Giles, 1888, 15 R. 952.

(*b*) Montrose Kirk-Session v. Tailour, 1898, 6 S.L.T. 125.

(*c*) See Ersk. ii. 6, 11.

(*d*) See *ante*, p. 137.

his family pew, he would thereby acquire a right in the disposal of the material other than as a pertinent of his estate. By our ancient practice the carpet or cushion belonging to the seat in the church was included within heirships moveable (*a*).

110. The right to seats in a parish church within burgh, or in that part of the area in a burghal-landward parish which is allocated to the magistrates for the burghal district, is held rather under special contract than in connection with heritable ownership. Hence, the nature and terms of the title of possession may affect and determine the nature of the right of succession thereto. If the right granted be one of occupation merely, in favour or for behoof of a family, this may tend to impress the right with the character of one in favour of the executors, as opposed to the heir. On the other hand, when the right is one of property in as opposed to the mere use and temporary occupancy of the seat, then, as constituting a right of ownership in an heritable subject, it descends to the heir and not to the executors. This seems to be the doctrine recognised in *Telfer v. Fulton* (*b*), which related to seats in a dissenting meeting-house; and it is that adopted and applied in a case as to the right of succession to the seats in a burghal-landward parish church (*c*).

Right to seat
in a burgh
church.

(*a*) See Ersk. iii. 8, 18.

(*b*) June 1810, Hume, 192.

(*c*) *Milne v. Wills*, 1869, 7 M'P.

406. Cf. *Watson v. Watson*, 1760, M. 5431, 7917.

CHAPTER VI.

ON CHURCHYARDS.

CHAP. VI.

SECTION I.—*Disposal of the Dead by the Romans.*

Crematio and
sepultura.

1. In the disposal of the bodies of the dead the Romans made use of two methods, viz., burning and burial, styled respectively *crematio* and *sepultura*. The former method, which they are said to have adopted from the Greeks, became general toward the end of the Republic, and continued so for a considerable period under the Empire. Its use became gradually less common after the introduction of Christianity, and by the end of the fourth century was superseded by the other and earlier method, viz. that of inhumation (*a*).

Public and
private burial-
grounds.

2. By the law of Rome the bodies of the dead might be interred in private or in public burial-places. Accommodation within the latter was obtained either by the acquisition of the *solum* of ground for the grave, or of that of the *jus inferendi*, or right of interment in it. Owing to the popular belief that the spirit of the dead body hovered around the spot where it was laid, the place was reckoned *locus religiosus*. The preservation of the tomb itself, and of the undisturbed repose of the remains which it contained, were matters of special solicitude, to secure which the law imposed penalties and punishments varying in amount and in degree of severity upon those who were guilty of either offence (*b*). The burial of the dead within the city was originally forbidden by the law of the Twelve Tables. It was made matter of fine and confiscation by a rescript of Hadrian, and the practice was again prohibited by Theodosius II. (*c*).

(*a*) See Smith's Greek and Roman Antiquities, 3rd ed. p. 643 *et seq.* and authorities there cited.

(*b*) See Dig. lib. xlvii. tit. 12, *De sepulchro violato*.

(*c*) See Smith's Greek and Roman

SECTION II.—*Adoption of the Rite of Burial by the Christian Church.*

CHAP. VI.

3. To the early believers in the truths of revealed religion the sublime doctrine of the Resurrection naturally formed one of the most fondly cherished articles of their faith. The destiny of the material body which this doctrine, notwithstanding St. Paul's teaching to the contrary, was supposed to imply, seemed to condemn the practice of burning, and to enjoin the propriety of interring the remains of the departed. Accordingly, burial, which had received the highest sanction of authority in the person of THE REDEEMER, was adopted by the early Christians not only as the most becoming, but as the divinely appointed method of disposing of the dead.

Burial
adopted by
the early
Christians.

4. During the periods of persecution with which the church was visited it was customary to deposit within subterranean passages, styled *cryptæ*, the remains of those who had suffered for the faith; and thither the early Christians were wont to resort for the purposes of secret devotion and commemorative piety. After toleration was extended to the Church, the practice was introduced of erecting chapels or shrines over the graves of certain martyrs (*a*), and of removing to and depositing within their hallowed precincts the bodies of others which had been secreted in places of concealed sepulture. The honour of burial within these buildings came subsequently to be conferred on those who had been remarkable for their ascetic virtues or pious munificence. The venerated remains of these persons were commonly regarded in the light of sacred relics, capable of imparting a condition of sanctity to immediately surrounding objects; and owing to this superstitious belief it became a matter of general desire to be laid after death within one of these hallowed edifices.

Interment of
the remains of
martyrs.

Burial within
buildings.

Antiquities, *ut supra*, and Dig. l. xlvii. tit. 12, and Codex Theod. l. ix. tit. 17, cap. 6.

(*a*) Styled *martyria*, or *sepulchra martyrum*.

CHAP. VI.

Regulations as to intramural burial.

Origin of churchyards.

5. To prevent the inconvenient and, in a sanitary point of view, dangerous consequences which a general compliance with this desire was calculated to entail, it was, in the ninth century, made matter of ecclesiastical enactment that bodies should be interred only outside the walls of churches, and in certain specified localities within them (*a*). These limits proving insufficient to supply the required burial accommodation for any considerable community, the expedient was adopted of providing, and devoting to this purpose exclusively, particular portions of ground. In the general case the ground selected was in the immediate vicinity of the church for the use of whose members it was specially intended; but when this arrangement was impracticable, and ground at a distance required to be chosen, it was usual to erect a chapel thereon, which served at once to represent the parish or parent church, and to afford the requisite accommodation to those engaged in conducting the funeral services. To these burial-grounds, as well as to their places of sepulture generally, the early Christians applied the suggestive epithets of *cœmeteria* or *dormitoria* (*b*).

SECTION III.—*Obligation to provide Parish Churchyards.*

Use of the parish church-yard.

Obligation to provide one.

6. On the introduction of parishes, and the establishment of parish churches, it naturally came to be regarded as a convenient and, in every way, a suitable arrangement, that a special portion of ground should be devoted to the interment after death of those who at the time of their decease were members of the parochial community. The law of Scotland

(*a*) The parts of the church in and around which the burial of the dead was permitted by the Council of Nantes (A.D. 850) were, 1st, the *atrium*, or vacant space adjoining the doors of the church; 2nd, the *porticus*, being the door-way or covered way in a church or monastery; and 3rd, the *exedrae*, which appear to have been portions of the external walls of

the church.—See Van-Espen, *Jus Eccles. Univ.* pt. ii. sec. 4, tit. 7, cap. 2; and Ferraris, *Biblioth. Canon.* voce “*Sepultura*.”

(*b*) In his *Jus Eccles. Protest.* iii. 28, 10, Boëhmer defines a cemetery to be “*locus publicus ad sepulturam unice destinatus, et auctoritate sacra solleniter erectus, ut plurimum adibus sacris vel religiosis cohærens.*”

seems to have assumed this to be a matter of social necessity ; and the obligation to provide ground commodious in point of size and suitable in point of situation for burial purposes, although not specially imposed by statute (*a*), is recognised to attach to the heritors of the parish in much the same way, and to a somewhat similar effect, as does the obligation to provide church accommodation (*b*)—the reason probably being that from the pious nature of the rite of interment the churchyard forms a natural adjunct of the parish church.

7. According to our law a churchyard may be described as a space of ground appertaining and generally contiguous to a parish church (*c*), dedicated to the purpose of interment after death of the inhabitants of the parish to which the church belongs. Save in those cases where a churchyard existed prior to the Reformation, which subsequently continued to be used as the parish burial-place, ground for this purpose required to be supplied in connection with each parish. Hence the acquisition of ground, its dedication as a place of interment, and its appropriation to this use for the exclusive behoof of the inhabitants of a particular parochial district, express the three leading attributes of a parish churchyard.

Parish church-
yard, *quid* ?

8. On the abolition of Popery the burial-grounds which were attached to churches naturally passed, with the buildings

Transfer of
churchyards
on the
Reformation.

(*a*) Thus, of the four early statutes which relate to churchyards, the Act 1563, c. 76, enjoins “the reparrelling “and upholding of churches and “churchyards ;” that of 1597, c. 232, the building and repairing of churchyard dykes ; while the Acts 1503, c. 83, and 1579, c. 70, prohibit fairs and markets within churchyards ; but none of them expressly ordain the providing churchyards in the case where none exist.

(*b*) See per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 917, who observes : “Every one must see “that the churchyard must be provided, as well as the church, by the

“heritors alone of a country parish, “and consequently both must be “governed by the same principles of “law.”

(*c*) Forbes, *Tithes*, p. 214, describes the churchyard as that spot of ground within which the church stands ; and in *Richmond v. Fife's Trustees*, 1844, 6 D. 701, Lord Fullerton seems to have held that the area of an old parish church, situated in the parish burial-ground, which was superseded by a new church, thereby became part of the churchyard. See also *Wright v. Elphinstone*, 1881, 8 R. 1025, *Russell v. Bute*, 1882, 10 R. 302.

CHAP. VI.

themselves, to the Reformed Church and, with the tacit consent or sanction of the ecclesiastical authorities and the parochial communities, continued to be applied to the same use as that which they had formerly served (*a*). In numerous instances, however, arising from the erection of new parishes after the Reformation and from other causes, a churchyard required to be for the first time provided, or the existing churchyard to be enlarged. Either alternative may, and the latter alternative does not unfrequently, still occur, and either alternative involves the necessity of providing ground to some extent more or less in quantity, as the case may require.

Burden of
supplying
ground lies on
heritors.

9.^a The burden in question has subsisted since the Reformation (*b*); and whether it consists in supplying ground to be applied in the formation of a new churchyard, or in the enlargement of one already existing, the burden appears to lie on the heritors of the parish. As already stated, this burden has not been expressly imposed by statute, but its existence as now mentioned has been affirmed by decision and judicial *dicta*, and has been recognised by an uncontradicted and long established usage. Thus, in the case of Greenock (*c*), it was expressly found that the additional burying-ground there required “must be furnished by the heritors who have ground “for the purpose.” Although this case was reversed on appeal, it was so on a technical point of pleading merely, and one which left untouched the heritors’ liability to provide the

Case of
Greenock.

(*a*) An example to this effect occurs in *Heritors of South Leith v. Scott*, 1832, 11 S. 75.—See Session papers, Revised Case for the pursuers.

(*b*) See per Lord Hailes in *Town of Greenock v. Stewart*, 1777, who says, 2 Hailes, 758: “This question could “never occur in our ancient law; for, “as the Popish clergy reaped great “emoluments from burying the dead, “they were always ready to furnish “burial-ground.” See also per Lord Ordinary Medwyn in *Heritors of South Leith v. Scott*, 1832, 11 S. at

p. 78, who says: “It is only since the “Reformation that the burden of “maintaining churches and church- “yards, and furnishing additional “ground for the latter, where neces- “sary, has been laid upon the heri- “tors, and they have in consequence “come to have a right of a qualified “nature in these subjects.”

(*c*) *Town of Greenock v. Stewart*, 1777, M. 8019, and *Kirk-Yard*, Appx. 1, 5 Br. Supp. 414, 2 Hailes, 758, and there per Lords Hailes and Braxfield; reversed 1779, 2 Paton, 486.

ground required. A similar doctrine to that now stated was subsequently laid down as one which admitted of no doubt in the cases of Tillicoultry (*a*) and of South Leith (*b*).

10. On the principle that the churchyard is an adjunct of the parish church, and is regulated generally by similar rules of law (*c*), the mode in which the obligation of providing burial-ground for the parish is discharged by the heritors either voluntarily or compulsorily, accords substantially with that in which they are bound, and may be required, to supply church accommodation (*d*). The Presbytery of the bounds are not only entitled to call on the heritors to perform, when necessary, this duty, but may also judicially ordain them to do so (*e*). The parishioners also, in respect of their right to burial accommodation within the parish, are entitled to require the body of heritors to provide ground necessary for the purpose, and, failing compliance with their demand, may apply to the Presbytery to pronounce an order upon, or, if necessary, a deliverance against, the heritors to this effect. Should this deliverance be disregarded, the Presbytery may then proceed to select and designate a particular piece of suitable ground (*f*). This having been done, and duly intimated to the heritors as a body, and to the individual proprietor of the ground chosen, the applicants or the Presbytery would be entitled, if necessary, to vindicate the appropriation of the ground as the parish churchyard, or as an addition to it, in an action containing conclusions to this effect directed against the proprietor and tenant of the ground selected—the body of heritors and the kirk-session of the parish being also called as defenders (*g*).

Rules *quoad* designation of churchyards and churches similar.

(*a*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 917.

(*b*) See per Lord Ordinary Medwyn in *Heritors of South Leith v. Scott*, 1832, 11 S. at p. 78.

(*c*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, *supra*, 6 S. at p. 917.

(*d*) On this subject, in connection with the steps of procedure in the

designation of churches, see *ante*, CHAPTER V., and *post*, CHAPTERS XII. and XIV. *passim*.

(*e*) *Walker v. Presbytery of Arbroath*, 1876, 3 R. 498; *affd.* 4 R. (H.L.) 1.

(*f*) *Ibid.*

(*g*) See *Town of Greenock v. Stewart*, *supra*, M. 8019, and else-

CHAP. VI.

SECTION IV.—*Amount, situation, and character of Ground to be designated.*

Extent of
ground
required.

11. When, from the increase of the parochial community or other cause, the burial accommodation afforded by the existing churchyard is too limited for the wants of the parish, the heritors are bound to supply additional ground of such extent as is sufficient to meet the deficiency (*a*), and, it may be, prevent a recurrence of it, at least for some considerable time to come. On a similar principle, when a churchyard is to be provided for the first time, the space of ground to be supplied for this purpose must be commensurate with the demands of mortality within the parish. What the precise extent of ground so required may be cannot be fixed by any arbitrary standard. It resolves into a question of reasonable probability and calculation in each individual case, and is dependent on a variety of considerations. On the one hand, the heritors are not to be unnecessarily burdened in the matter. On the other hand, the extent of ground to be supplied must be sufficient for the decent interment of the dead according to the average rate of mortality of the resident parish population. This in its turn implies a respectful regard to the repose of bodies already buried, whose tenancy in the grave ought not to be prematurely disturbed. On a balance of such considerations, the question of the *quantum* of ground required seems ultimately to depend—that extent of ground being at once sufficient and necessary which, with proper management, is fairly capable of realising these conditions.

Proximity
to church
leading rule
in choice of
ground.

12. In the absence of statutory enactment on the subject, exemption from, or priority in, selection of ground for parish burial purposes does not depend on the character of the ground, viz. that it is not, or that it is, church lands. That

where reported as stated *ante*, p. 174,
note (c); Walker v. Presbytery of

Arbroath, 1876, 3 R. 498, affd. 4 R.
(H.L.) 1.

(a) *Ibid.*

which determines choice or selection in the matter is, in the first instance, mainly the situation of the ground. As an adjunct of the parish church the churchyard is usually situated in immediate proximity to that building. Besides considerations of moral fitness and congruity, reasons of convenience and practical advantage justify such an arrangement; and, while the point does not seem to be judicially fixed, it may perhaps be assumed that, unless good reasons to the contrary exist, the heritors, on the erection of a new parish *quoad omnia*, might be called on to provide ground for the churchyard contiguous to the site of the church. In the case of an existing parish, the general rule seems to be that, when additional burial-ground is required, the ground selected ought to be contiguous to, and, as it were, form an enlargement of the old churchyard (*a*).

13. This leading rule, however, as to the selection of ground for parish burial purposes is subject to important qualifications modifying rule. Ground well circumstanced in point of situation may, from the quality or character of the soil, or from its superficial conformation, or other causes, be less adapted for use as a place of burial than ground more distant from the church or from the existing churchyard. Or, although well fitted in all these respects for the use in question, it may be of such value, either as an agricultural subject or otherwise, or it may be in such a state of occupation—as garden, or policy-ground, or plantation—that to devote it to the use of burial would be to entail loss or injury to an unreasonable extent on its owner, and, indeed, on the heritors of the parish generally, under his claims of relief against them. In such and similar cases the rule of situation above expressed, which is truly rested on the assumed general convenience of the parochial community, and in particular of the body of heritors at whose expense the ground is provided, will give way

(*a*) See second finding of the Lord Ordinary's interlocutor in *Town of Greenock v. Stewart, M. Kirk-Yard*, Appx. 1, and *supra*, p. 174, note (*c*).

CHAP. VI.

Character of
the ground
must accord
with use of
burial.

to other counterbalancing considerations, and be correspondingly modified.

14. The ground, which the heritors are to provide, being destined to the special use of the burial of the dead, the condition of fitness for this use forms an important element in its selection. As economy of labour in the formation of graves, and facility in their reallocation and change of site from time to time, are matters of importance in the use and management of parish churchyards, rocky ground, according to the degree of its extent and solidity, is proportionately ill adapted for allocation. Economy of space—*i.e.* extensiveness of burial accommodation as compared with the superficial extent of the ground—is also a matter of importance. Hence, depth of sandy or loamy soil to the downward limit to which graves are usually dug—*viz.* 6 or 8 feet—is a qualification. Marshy or boggy ground, according to its degree of wetness, is also unsuitable for allocation as a churchyard. Grave-making in such ground is a tedious and difficult process, and from the presence of water the grave when made often fails to afford a becoming place of repose for the dead. Besides this, the choice of such ground is not consistent with the convenience, comfort, or health of those visiting graves, whose interests in this matter are likewise to be considered and cared for (*a*). The above, and other circumstances of a kindred nature, affecting the quality and character of the ground, form elements of choice or preference, and, as in a question between two or more portions of ground equally convenient in point of situation, would operate more or less in determining the selection to be made.

Presbytery's
interference in
selection of
ground.

15. While the heritors of the parish as a body, at whose expense ultimately the ground is to be provided, have an influential, and in many cases perhaps the determining

(*a*) By the Lord Ordinary's interlocutor in the case of Greenock, *cit.*,

it was, *inter alia*, found that the soil of the churchyard should be dry.

voice in the selection of the portion of ground to be allocated (*a*), the Presbytery of the bounds are likewise entitled to interfere in the matter; and in the event of non-agreement among the heritors on the subject, to select the portion of ground to be provided, subject to a review of their choice or judgment in the matter by the proper civil tribunal (*b*).

SECTION V.—*Claim of Relief competent to Owner of Ground designated.*

16. The portion of ground selected for designation as the churchyard, or as an addition to it, is generally the exclusive property of a single heritor. While this entails on the individual owner, in the first instance, an obligation to supply such portion of ground, his liability in this respect is subject to the right of relief against the other heritors of the parish for a proportionate amount of its value.

Owner of ground taken has relief against other heritors.

17. Assuming the rule in the matter to be similar to that which would have obtained in the building or enlargement of the parish church, it would seem to follow that, in the case of landward parishes, the rule of relief competent to the owners or owner of ground so allocated against the other heritors would be according to the rent of their respective properties—*i.e.*, the valued rent in a purely rural parish, the real rent in a parish with an urban element. Although there does not appear to be a distinct decision to this effect, the principle is not in itself inequitable. In general the respective shares of rent for which heritors in landward parishes are assessed bear a proportionate ratio to the extent of their properties and the number of their tenants; and as the parish churchyard is intended for the accommodation after death of the heritors, their families, tenants, and

According either to real or valued rent.

(*a*) *Ibid.* see per Lords Hailes and Gardenston, 2 Hailes, 758–9. Arbroath, 1876, 3 R. 498, affd. 4 R. (H.L.) 1.

(*b*) Walker v. Presbytery of

CHAP. VI.

dependents, this rule of liability in relief, according to the rents of their properties, is indirectly an approximation to the principle of making them contribute for the cost of the burial-ground provided, according to the extent to which they are likely to require and use it.

Rule adopted
in case of
Greenock.

18. In the case of Greenock (*a*), which was a burghal-landward parish, and where additional burial-ground was required, the Court of Session ruled that the owners of the ground taken were to be indemnified by the other heritors and by the town, in proportion to the examinable persons resident on their estates and within the town respectively. The judgment of the Court of Session having, on appeal, been reversed on a technical point of pleading, no procedure followed on their judgment; and it does not appear that the rule of relief as stated was ever afterwards actually applied.

Rule in
burghal-
landward
parishes
suggested.

19. In the case of burghal-landward parishes, according to the understanding of the law when Mr. Duncan wrote, it was thought to be a reasonable and just rule of relief to allocate among the individual heritors, including the urban community, treated as a single heritor, according to the real rent of their respective properties, the price or value of the ground provided, in proportion to the extent to which each obtains or requires an allocation of the ground. It would now, however, probably be held that all the heritors were liable in relief according to their respective real rents, without reference to the local situation of their lands either within or without burgh. Reference is made to the discussion of this question in relation to assessments in Chapter XII. (*b*).

SECTION VI.—*Designation of Ground as the Parish Churchyard.*

Designation
of the ground
by the Pres-
bytery.

20. When ground suitable for burial purposes for the parochial community has been provided, the ground ought

(*a*) Town of Greenock v. Stewart,
1777, *cit.* p. 174, note (*c*).

(*b*) See also *supra*, p. 150.

then to be formally dedicated to this use by designation as the parish churchyard, or as an addition to the existing churchyard, according to circumstances. Such designation may be competently effected by a declaratory deliverance to the above effect pronounced by the Presbytery after inspection of the ground by a committee of their number appointed for this purpose, or on the approval of a favourable report by men of skill on the subject. The deliverance should be pronounced at a regularly convened meeting of Presbytery, and engrossed in their minutes, and an extract of it, duly certified, should be transmitted to the clerk of the kirk-session of the parish, and entered in or preserved as part of their records. The act of designation operates as a destining of the ground to the use of burial for the parishioners, and as a solemn dedication of it to this use. The ground then becomes the parish churchyard(*a*); and this character, with all the relative rights and obligations, it continues to retain until effectually divested thereof.

21. Formal designation of the ground is not, however, essential to effect this result. Constructive designation will suffice; and such designation may be inferred from facts and circumstances clearly instructing an intention on the part of the owner of the ground to destine and devote it to the purposes of parochial burial. Among other elements of evidence tending in this direction may be mentioned the enclosing of ground contiguous to the parish churchyard in such a way as to remove any actual or constructive boundary formerly existing or presumed to exist, especially if the ground has afterwards been used, and particularly by its former owner, as a place of burial.

22. Thus, in the case of Rathen (*b*), a piece of ground contiguous to the parish churchyard had, in 1636, been surrounded

(*a*) "The right of which is fully perfected by the designation of the Presbytery, without any grant from the Crown."—*Ersk.* i. 3, 8. See

Walker v. Presbytery of Arbroath, 1876, 3 R. 498, 4 R. (H.L.) 1.

(*b*) See *Philorth v. Heritors of Rathen*, 1666, M. 5620.

Case of
Rathen.

CHAP. VI.

by a dyke, built, as was alleged, by order, or at least with the knowledge of the pursuer, which dyke formed a continuation of that surrounding the churchyard. In this piece of ground, which belonged to the pursuer, and apparently after the dyke was built, he had, as was alleged, buried certain of his tenants. In an action brought by him in 1666, to vindicate his right of property in the ground so enclosed, the Court appear to have held that the facts stated amounted to a relevant averment of constructive designation of the ground as part of the churchyard.

Use for forty
years.

23. While a constructive designation of ground as a parish churchyard will in all probability be inferred from its continuous use for forty years as the place of burial of the parishioners, its use as a place of burial for a period of thirteen years only by the heritors or minister of the parish will not apparently *per se* have this effect—the rule of the *decennalis et triennalis possessio* not being applicable to the vindication of such a right (*a*).

SECTION VII.—*For whose accommodation the Churchyard is provided.*

Provided for
parishioners.

24. As the burden laid by law on heritors to supply ground for burial purposes is one which is limited and local in its nature—the imposition of the burden being due not to general but to parochial requirements—so the use of the churchyard when provided is correspondingly limited. It is not intended and ought not to be used as a place of burial for strangers from a distance. On the contrary, it is a piece of ground formally appropriated and dedicated as a place of interment in connection with the parish church, for the burial of the bodies of the resident inhabitants of the parish, and of those generally to whom the term “parishioner” applies. Within this term are included the heritors of the parish, their families, tenants, and servants; the minister of

(*a*) *Ibid. supra*, and particularly Stair’s report of the case, M. 5621.

the parish and his family, and all others who, by virtue of residence, have obtained, and at the date of their death possessed, the status of parishionership. Proprietorship and residence appear to be the tests in this matter (*a*).

25. The owners of heritable subjects in the parish, *qua* heritors, are parishioners, and as such are entitled to have allocated to them, *qua* part and pertinent of their lands in the parish, burial accommodation in the churchyard, not only for themselves, but also for the members of their families, including probably their domestic and out-door servants; and for their tenants on their property lands and their families, cottagers, and generally all persons resident upon their properties. The minister of the parish appears to be, *virtute officii*, as well as in most cases by residence, also a parishioner, and he, and his family through him, are entitled to be buried in the churchyard. When parishionership is not derivatively acquired by an individual through connection with the property lands of a heritor, or as being included within the category of his family, this status may be directly acquired from residence within the parish for such a period, or of such a character, as indicates the adoption of it as his home or settled place of abode.

Heritors and
their families.

Servants and
tenants.

Minister and
his family.

26. One of the findings by the Sheriff in the case of Scone implies that every one who *dies* within the parish is entitled to be buried in the churchyard (*b*), and this view, which seems to be supported by the opinion of Lord Craigie in the same case (*c*), appears to be sound.

Persons dying
within the
parish.

27. Save in his character of a parishioner, when such a character belongs to him, it would rather appear that neither the titular of the teinds of the parish nor a superior of lands (*d*) within it is entitled to demand burial accommodation in the churchyard.

Titular and
superior.

(*a*) *Cunninghams v. Cunningham*, 1778, 5 Br. Supp. 415.

(*b*) *Mansfield v. Wright*, House of Lords, 1824, 2 Shaw App. 106, top, not reported in Court of Session.

(*c*) *Ibid.* p. 107: "From 1784 to 1804 every person dying in the parish had a right to be buried in the churchyard."

(*d*) See per Lord Braxfield in

CHAP. VI.

Interment in
churchyard
optional.

28. By the Canon law the burial of parishioners outwith their own parishes was prohibited, and those by whom such irregular burials were performed might be called on to restore the body to the incumbent of the parish to which it belonged (*a*). Although traces exist in Scots law indicative of an obligation on the part of the inhabitants of a parish to bury their dead within its churchyard (*b*), the selection of a burial-place is truly a matter of choice, not of legal requirement; and the parishioners are at liberty either to bury their dead out of the parish, or in ground within their parish not forming part of the parish churchyard (*c*).

SECTION VIII.—*Management of the Churchyard.*

Grant of
ground in
trust.

29. The designation, actual or constructive, of ground as the parish churchyard implies an anterior constructive grant thereof by its former owners in favour of certain persons, *qua* administrators or trustees of the subject, as a place of interment for the bodies of deceasing parishioners. In the case of landward parishes the persons in whose favour this constructive grant is made are the heritors of the parish as a body; and in the case of landward-burghal parishes, the heritors of the landward district and the magistrates of the burgh, *qua* heritors (*d*) of the urban district, and as representing and acting on behalf of its inhabitants—the landward proprietors and the magistrates constituting the heritors of

Dundas *v.* Nicolson, 1778, M. 8511, and 2 Hailes, 802, who says: "They who have only a right of superiority have no share in the division of the church. The superior is not entitled to set his foot within the church, or even within the parish."

(*a*) See Ferraris, *Biblioth. Canon. voce* "Sepultura;" Barbosa, *De Officio et Potest. Paroch.* c. 26; Boehmer, *Jus. Paroch.* sect. 4, c. 2.

(*b*) Thus, in actions for the transportation of churches or erection of parishes, it was usual to insert a conclusion in the summons applicable to the churchyard to the effect that the

inhabitants of the parish should be decerned and ordained to bury therein in all time coming. As an example of this see *Maitland v. May*, 1766, 1 Hailes, 109.

(*c*) *Kirk-Session of Duddingston v. Halyburton*, 1832, 10 S. 196.

(*d*) See per Lord Ordinary Moncreiff in *M'Neel v. Robertson*, 1836, 14 S. at p. 851. As explained elsewhere, the position of magistrates when the whole parish is assessed upon the real rent is now a very dubious matter. See *supra*, p. 150, and *infra*, CHAPTER XIII.

the entire parish. Such implied grant involves a trust, and imposes on the body of heritors, or on them and the magistrates jointly, the twofold duty, 1st, to maintain the subject in a sufficient state to fulfil or subserve the use to which it has been destined; and, 2nd, to apply it to that use in the way which is at once most judicious for the interests of the living and most respectful to the memory of the dead.

30. This right of guardianship and management of churchyards is, in the case of landward parishes, conferred, Guardianship in landward parishes. in the first instance, on the body of heritors as “a constituted authority recognised by the law of the land” (*a*); and this right they are entitled to vindicate (*b*). It is also devolved on the kirk-session of the parish, either as having a constructive delegated authority in this matter from the body of heritors (*c*), or in respect that this judicatory independently possesses the character of legal guardians of such parochial ecclesiastical property. The parishioners, as such, *i.e.* save in their character of heritors, are not guardians or managers of the churchyard, and therefore are not entitled to interfere in its economy (*d*), although they may possess a sufficient interest and title in many cases to apply to the proper judicatories to control or enforce the due management of the subject by the heritors or the kirk-session of the parish (*e*). On the other hand, where the parish is burghal-landward, Guardianship in burghal-landward parishes. the magistrates of the burgh, as representing the inhabitants—for whose behoof, along with the inhabitants of the landward district, the churchyard has been provided—are, jointly with the body of heritors and the kirk-session, charged with the twofold duty above referred to in connection with the churchyard.

(*a*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 918; *Fraser v. Turner*, 1893, 21 R. 278.

(*b*) *Ibid.* See also *Hay v. Williamson*, 1778, M. 5148, where this right was exercised.

(*c*) Per Lord Ordinary Cringletie,

ut supra. See also *Steel v. St. Cuthbert's*, 1891, 18 R. 911.

(*d*) Per Lord Ordinary Cringletie, *ut supra*, 6 S. 917.

(*e*) See *Wright v. Elphinstone*, 1881, 8 R. 1025; *Russell v. Bute*, 1882, 10 R. 302.

CHAP. VI.

Presbytery's
right of super-
intendence.

31. While in a certain sense Presbyteries, *qua* guardians of church establishments, may also be regarded as possessing the right of superintendence over the churchyards within their bounds, this right belongs to them rather *qua* tribunals having jurisdiction to compel the heritors to provide due burial accommodation for the respective parochial communities within their bounds, than as having any direct right of management in the churchyard under the implied fiduciary grant of the subject.

SECTION IX.—*Maintenance of the Churchyard.*

What main-
tenance
includes,

32. The obligation of maintaining the churchyard after it has been provided, equally with that of supplying ground for it originally, devolves on the heritors, and includes (1) the duty of building and keeping in repair walls round the churchyard (*a*), having a convenient means of access; and (2) the further duty of keeping the ground generally in a decent and becoming condition. The former duty is imposed by the Act 1597, c. 232, which ordains that the “parochiners” —by which term is to be understood heritors—of each parish are to build the churchyard dyke with stone and mortar to the height of two ells, and keep the same in repair. The dykes are to be made with sufficient stiles and entrances for passage to the church and churchyard; and the Judges of the Court of Session are to give letters of charge for putting these enactments in force. The duty of keeping the dykes in repair was for the first time enjoined by the Act 1563, c. 76.

Statute 1597,
c. 232.

33. As appears from this statute, churches and churchyards had at its date fallen into considerable decay, and for “reparalling and uphalding” the same it was ordained that the Lords of Secret Council should advise on the subject, and that whatever order they should make thereanent should have the force of law. It does not appear what special

(*a*) See *per curiam* in *Spence v. Hall*, 1st Dec. 1808, F.C.

instructions, if any, were issued on the matter. But within the scope of this statute, or otherwise, of the duty devolving at common law on those charged with the guardianship of the churchyard, is included that of preventing any improper or inconvenient occupation of the surface of the churchyard, and of keeping the ground generally in a becoming condition—that is, one which is alike consistent with respect for the buried dead, and with the health and comfort of those attending funerals or visiting the graves.

Improper
occupation of
the ground.

34. Although perhaps a matter rather of courtesy or special permission than of abstract right (*a*), the practice of erecting tombstones and monumental slabs over graves in parish churchyards is a very common and a very ancient one. Enclosures of iron or stone are also frequently to be seen in churchyards; but they are now less common than formerly, when the spoliation of dead bodies was of not unusual occurrence. Although the erection of such structures, which are not foreign or unsuitable to the place, may, within certain limits, be perfectly unobjectionable, yet when their number or proximity is such as to destroy or prevent reasonably sufficient access throughout any part of the churchyard, whereby the use of a portion of ground for burial is lost, or the act of interment there is rendered highly difficult or inconvenient from want of sufficient space or otherwise, then the existence of such structures amounts to an improper occupation of the surface of the churchyard (*b*).

Erection of
tombstones
and enclosures.

35. If from long neglect the churchyard has fallen into a state of disorder or dilapidation, or if from temporary causes, such as flooding by water or the blowing down of trees, the convenient use of the ground as a place of burial

“Reparrel-
ling” of the
ground.

(*a*) See *Cunninghams v. Cunningham*, 1778, 5 Br. Supp. 415. Also per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1823, 6 S. at p. 918; and per Lord Deas in *M'Bean v. Young*, 1859, 21 D. at p. 321; *Wright v. Wright*, 1881, 9 E. 15.

(*b*) This doctrine is recognised in the remarks of Lord Colonsay (then Lord President) and Lord Deas in *M'Bean v. Young*, 1859, 21 D. at pp. 318 and 321.

CHAP. VI.

is interfered with, respect for the sacredness of the place and the purposes for which it is destined, as well as regard for the health and comfort of those who are called on to visit it, impose on its guardians and managers the duty of "reparalling" the ground, and removing such or similar obstructions and sources of inconvenience or discomfort.

Encroach-
ments on
graves.

36. It is the duty of the guardians of the churchyard to protect the graves against encroachment, and generally to preserve the undisturbed repose of the bodies there interred (*a*). At the same time the heritors, *qua* managers of the churchyard, may make such alterations in the arrangement or disposal of the ground as reasons of convenience or propriety demand or justify. Thus they may alter the level of the churchyard. While in the execution of such or similar alterations circumstances will seldom occur to warrant the removal of, or indeed any interference with, the remains of the dead, interference with the surface of graves or lairs may be permissible if strictly within the limits of judicious requirement—the ground being immediately redressed and restored to a decent condition (*b*).

SECTION X.—*Becoming use of the Churchyard, and its vindication.*

Acts of
desecration of
the ground.

37. Besides the keeping of the churchyard in a state of neatness, and the preventing all such occupation of it as prevents or obstructs its convenient use as a place of burial, the duty likewise devolves on its legal guardians to prevent encroachment on (*c*) or trespass over the ground, as well as all such acts of interference with or disposal of the churchyard as are inconsistent with the sacred character of the spot

(*a*) In *Ure v. Ramsay*, 1828, 6 S. at p. 919, Lord Ordinary Cringletie remarks,—“If danger from resurrection “men arises, the people ought to “apply to the heritors and kirk- “session to assist them, who will not “fail to afford protection.”

(*b*) *Robertson v. Salmon*, 1868, 5 S.L.R. 405; *Turner v. Mackenzie*, 1869, 7 M.P. 538; *Steel v. St. Cuthbert's*, 1891, 18 R. 911.

(*c*) See *Fraser v. Turner*, 1893, 21 R. 278.

and offend against either public decency, good taste, or pious feeling. All such acts amount to a desecration, either actual or constructive, of the churchyard, and are at once inconsistent with its becoming use and illegal. No part of the churchyard, or any building therein, can be devoted to the worship of any dissenting community (*a*).

38. The holding of markets and fairs, or meetings devoted to mercenary pursuits or to merrymaking, on ground specially dedicated to the undisturbed repose of the dead, is an outrage against propriety and decorum; and whether the old Acts 1503, c. 83, and 1579, c. 70, which prohibit such meetings in churchyards, be still in force or not (*b*), it cannot admit of doubt that assemblies of the kind alluded to in a parish churchyard are illegal. Nor is it lawful to allow cattle to stray or graze over churchyards. He to whom the grass growing thereon belongs may no doubt use it for pasture after it is cut and carried off the ground; but his cattle may not consume it while growing or lying there. It is not a respectful use of the churchyard to convert it into grazing ground; and no usage, though long continued and recognised at the time, will justify such a practice, which is "a violation of public decency and of the rights of all concerned" (*c*).

39. Promiscuous walking across the ground of the churchyard, or over the graves in it, is likewise unbecoming and unlawful. There is no such servitude as this known in the law of Scotland, and no length of time will convert a tolerance of such a practice into a right of way (*d*). Such passage throughout the churchyard as is requisite for the due performance of the right of sepulture, and for convenient

(*a*) *Wright v. Elphinstone*, 1881, 8 R. 1025. See also *Russell v. Bute*, 1882, 10 R. 302.

(*b*) See Mackenzie's *Observations* on these statutes, pp. 115, 189.

(*c*) See second finding in Lord Ordinary Meadowbank's interlocutor in *Spence v. Hall*, 1st Dec. 1808, F.C.; also *Hay v. Williamson*, 1778, M.

5148; and *Beaton v. Dallas*, 1734, Elchies, *Glebe*, 1.

(*d*) Per Lord Deas in *M'Bean v. Young*, 1859, 21 D. at p. 321. Yet in *Turner v. Mackenzie*, 1869, 7 M.P. 538, Lord Justice-Clerk Patton doubted whether a public passage over a lair in the churchyard was in all circumstances illegal.

Markets and fairs.

Pasturing.

Promiscuous walking.

CHAP. VI.

access to the graves, appears all that is essential in the matter of access toward the appropriate and complete use of the subject, and serves to indicate the nature and extent of the *jus spatiandi* within it.

Becoming use
of the church-
yard.

40. The special destination of the ground as a place of burial for the deceasing parishioners renders any other use of it illegal; while its occupancy by the dead confers upon it the character to a certain extent of a *locus religiosus*, and limits or qualifies the mode in which, even *qua* churchyard, it may with propriety be used. These two considerations accordingly appear to involve the result that a becoming use of the churchyard is only made when, having regard to this its special purpose and sacred character, it is exclusively occupied as a place of interment for the deceasing parishioners in such a way as is consistent with good taste and pious feeling.

Right to
vindicate use
of churchyard.

41. In the exercise of the duty of guardianship and management possessed by the heritors of the parish, they, as a body, have a complete right not only to pass resolutions and adopt extrajudicial steps with the view of securing the proper and preventing the unbecoming use of the churchyard, but likewise, when occasion requires it, to adopt the appropriate legal proceedings to attain these objects. The body of heritors may competently, and frequently do—particularly when legal measures are adopted—act by the intervention or in name of the kirk-session, who have an independent title (*a*).

Individual
heritors.

42. Not only, however, have the heritors as a body, or the kirk-session as representing them, or as acting independently in the matter, a good title to adopt proceedings for the vindication of the proper use and occupancy of the churchyard, individual heritors have a good and sufficient title likewise. As the churchyard was provided and is maintained at the joint expense of the heritors of the parish,

each member of the body has a certain patrimonial interest in its conservation; and being joint managers and guardians of it, each is personally interested in and entitled to discharge this trust. In each of the cases of *Arngask (a)* and *Tillicoultry (b)* the pursuers were two only of the heritors of the parish; and in the latter case, the plea of no title, in respect that they had not obtained the authority of the body of heritors, was specially but unsuccessfully urged. A single heritor out of several possesses a good title to insist in an action for the vindication of the proper use of what is admittedly the parish churchyard (*c*).

43. In the case of burghal-landward parishes, where the right of guardianship and management is vested jointly in the heritors of the rural district and the magistrates, *qua* heritors of the urban district (*d*), the latter appear to be entitled, either by themselves or along with the heritors or the kirk-session of the parish, to institute the requisite legal proceedings. Magistrates in burghal-landward parishes.

44. In general, any question in regard to the use or occupancy of the churchyard involves the decision of a possessory question merely. When this is so, or when, as will probably always be the case in churchyard disputes, the value of the subject-matter in dispute is less than £1500, the relative action may competently be brought in the Sheriff Court. Many of the cases bearing on the points just alluded to originated in that tribunal. Actions possessory.

45. When a party, though *de facto* a heritor, is seeking to vindicate his own personal interest in or right of use or right. Vindication of personal right.

(a) *Hay v. Williamson*, 1778, M. 5148.

(b) *Ure v. Ramsay*, 1828, 6 S. 916.

(c) Principle seems to support this view, which is in apparent accordance with the doctrine on the subject laid down by Lord Ordinary Cringletie in his note in *Ure v. Ramsay*, 1828, 6 S. at p. 917, and on review of his judgment, expressly approved of by Lord

Justice-Clerk Boyle, certain of the remarks by Lord Colonsay (then Lord President) and Lord Curriehill in *M'Bean v. Young*, 1859, 21 D. at pp. 318, 319, tend in a similar direction; and the doctrine was recognised in the more recent cases of *Wright v. Elphinstone*, 1881, 8 R. 1025, and *Russell v. Bute*, 1882, 10 R. 302.

(d) See *supra*, p. 184, note (*d*).

CHAP. VI.

possession of a grave or portion of the churchyard, he has, in virtue of such alleged interest in the subject, a good title to sue *qua* individual, independently of his character *qua* guardian or manager of the churchyard. On a similar principle a parishioner, though not an heritor, may, in certain circumstances, have a good title to sue for the vindication of his own alleged interest in or use of part of the ground (*a*). It is only when a heritor is seeking to protect or enforce the interests of the churchyard, as in contradistinction to his own individual interests in it, that he requires to possess and found on an effectual fiduciary title.

Of right of
management.

46. When, instead of vindicating the proper exercise of the right of management over what is admittedly the churchyard, the real object of the action is to assert a right of management over ground as being the churchyard, *i.e.* to have it declared that it is such, then probably the heritors of the parish as a body, or the kirk-session as representing them, or both, and not merely certain of the heritors—though suing *qua* heritors and guardians of the alleged churchyard—would require to be pursuers (*b*), or otherwise it would be necessary to call these bodies as defenders.

Parties to be
called as
defenders.

47. In view of the fiduciary relation in which the heritors stand to the churchyard, they as a body, and as representing the community of the parish, are the proper defenders in all actions the object or effect of which is to assert an adverse right of property in ground which has been dealt with or recognised as the parish churchyard (*c*). As in burghal-landward parishes the heritors include not merely the rural proprietors, but also the magistrates of the burgh *qua* urban heritors, so in actions of the nature alluded to—at least

(*a*) This, which is a principle of common law, seems to be recognised by several of the judicial *dicta* in *M'Bean v. Young*, 1859, 21 D. 318 *et seq.*

(*b*) This point is hinted at, but no distinct opinion expressed on it, by

Lord Colonsay (then Lord President) in *M'Bean v. Young*, 1859, 21 D. at p. 318.

(*c*) See *Laird of Philorth v. Heritors of Rathan*, 1666, M. 5620; also *Town of Greenock v. Stewart*, 1777, *cit.* p. 174, note (*c*).

where the burgh has a joint right of use of the churchyard—the magistrates should be called as defenders along with the landward heritors (*a*).

CHAP. VI.

SECTION XI.—*Allocation of Burial Accommodation in the Churchyard.*

48. The most ordinary and perhaps important duty which devolves on the heritors of the parish, *qua* managers of the churchyard, consists in the apportionment of burial accommodation within it for behoof of those who are entitled to be there interred, viz., the parishioners. In considering the manner in which this duty is to be discharged, the nature of the use of a parish churchyard must be kept in view.

For behoof of the parishioners.

49. While the space of ground provided as such is presumed and ought to be liberally sufficient in point of space to meet the demands of mortality occurring in the parish, it must be observed that this does not imply the appropriation of ground as a resting-place in perpetuity to each deceasing parishioner. Law does not as a general rule recognise a grave in the parish churchyard as a spot which is to be permanently occupied by any one inmate. On the contrary, law regards the churchyard as the last resting-place of successive generations, and each grave within it as the temporary resting-place of successive occupants, each of whom ceases, after a certain period of possession, to be any longer tenant (*b*). At the close of this period the body has, in obedience to the laws of nature, been resolved into its kindred dust. When this process is completed the purpose of the interment of the body is effected, and the ground is ready for the reception of another occupant.

Churchyard a temporary resting-place.

50. What the precise period is which must elapse ere a body buried in the ground is thoroughly decomposed cannot be absolutely stated. In this matter much depends

Period of decomposition.

(*a*) See p. 184, note (*d*).

affirmed by Lord Stowell in *Gilbert v. Buzzard*, 1820, 2 Hag. Con. 333.

(*b*) This doctrine is examined and

CHAP. VI.

on various concomitant circumstances and agencies, which act either in favour of or adversely to the conservation of the body, such as the age of the deceased, the nature of the disease which resulted in death, the manner in which the dead body is dressed, the period which has elapsed between death and burial, coupled with atmospheric conditions, the thickness or durability of the coffin, the depth of the grave, and the character of the soil. On the whole, however, it would seem that in soils of the character and composition usually met with in parish churchyards—which may be described as moderately dry—a dead body dressed in grave-clothes, enclosed in an ordinary deal coffin, and interred in a grave of from 4 to 8 feet in depth, will after a period of from eighteen to twenty-five years have, in almost all cases, become thoroughly decomposed.

Period of
tenancy.

51. If this estimate be approximately correct, it appears reasonable to conclude—although the point does not seem to have been decided—that in ordinary circumstances law would assume a period of about the above duration sufficient to bring the tenancy of a body buried in a parish churchyard to a close, and thereby to render the spot fit for the reception of a new occupant (*a*). On the footing now explained—viz., that the right of burial in the churchyard is a *jus inferendi*, and right of temporary repose merely, not a right of property in or permanent occupancy of the grave, and that when the body therein laid has returned to dust the space may be devoted to the interment of a new occupant—the right on the part of the heritors or kirk-session of the parish, *qua* managers of the churchyard, to allocate and re-allocate the ground for burial purposes ultimately rests.

Rule of allocation of ground.

52. The area of the churchyard, which, like that of the church, is vested in the heritors, *qua* administrators, for

(*a*) Reference may be made to the remarks by the Sheriff of Perthshire (E. S. Gordon) in his note in *Wilson v. Brown*, 1859, 21 D. at p. 1062, the

soundness of which Lord Cowan stated he did not see any reason to question. See also *Steel v. St. Cuthbert's*, 1891, 18 R. 911.

behoof of the parochial community, is apportionable among them on very similar principles (*a*). Consistently with this general doctrine the ground which it contains is, in the case of landward parishes, allocated to the heritors of the parish as burial accommodation for themselves and their families, or as family burying-places, and, in the next place, for their tenants and others resident on their properties (*b*). As the clergyman who dies while minister of the parish, and likewise the members of his family deceasing during his incumbency, are entitled to be interred in the churchyard, a portion of it ought apparently to be allocated for behoof of the minister for the time and his family (*c*); and probably the order of such allocation should take precedence of that made on behalf of the heritor's tenants.

53. The most appropriate rule of allocation is that which most nearly approximates the *quantum* of ground to be assigned to each heritor to the number of the persons on whose behalf he is entitled to demand burial accommodation. The application of the rule of the valued rent in purely rural parishes practically does so. For as such rent generally bears a corresponding ratio to the size of the estate, so it indirectly serves to suggest the number of persons who are likely to be resident on it, and in this way affords a rough measure of the amount of burial accommodation required. Accordingly, in purely rural parishes the *quantum* of ground to be allocated to the different heritors, as well as the order of choice in the selection of the ground, when a choice exists, appears to be regulated by the rule of the valued rent. Where there is an urban element in a landward parish the allocation, like the assessment, will be according to the real rent, but in this relation reference should be made to Chapter XIII.

(*a*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 917. Per Lord President Inglis in *Steel*, cited *supra*.

(*b*) *Cunninghams v. Cunningham*, 1778, 5 Br. Supp. 415.

(*c*) In conformity with the principle on which a commodious pew in the church is allocated for the use of the minister and his family.

Landward
parishes.

Order of choice
and amount of
ground in
landward
parishes.

CHAP. VI.

In burghal-
landward
parishes.

54. In the case of burghal-landward parishes, at least where the burgh or town has contributed towards the price or value of the churchyard, and so is entitled to participate in its use, the division of the ground, as in a question between the landward heritors on the one hand, and the urban community on the other, seems to be regulated by the rule of the real rent of their respective properties, which resolves practically into a division of the subject according to an approximate estimate of the relative populations of the two districts, burghal and landward, of which the parish is composed (*a*). Dealing with the magistrates of the burgh as representing the inhabitants, and as a single heritor, it would seem not an incorrect mode of procedure to allocate in one lot the portion of the churchyard required for the use of the burghal community, leaving to the magistrates the duty of making such subdivision of it among the inhabitants as may be just (*b*).

General
division of
ground seldom
made.

55. The actual condition of matters in connection with the churchyard is rarely such as requires or renders practicable a general allocation of the ground. In most instances all that is necessary to do, or that can be done, is either to allocate a portion merely of hitherto unoccupied ground or to make a re-allocation or authorise a re-use of ground which is or has been already occupied as a place of interment. Although in such cases the rules of division as now stated cannot be applied in a comprehensive or very systematic manner, these rules, and the principles on which they rest, may be advantageously appealed to as indicating the persons to whom, and the footing on which, such partial appropriation of the ground may be made.

(*a*) Thus the amount of ground required for the burial purposes of the parish depends on its population. The amount of contribution imposed on each section of the parish for the ground provided — and assessable according to the real, as opposed to

the valued rent—would be according to the extent and value of the property belonging to it, which, in turn, are indicative of and bear a certain proportion to the element of population in each parish.

(*b*) But see p. 184, note (*d*).

56. In particular, it is to be observed that right to a share of the churchyard belongs to a heritor in respect of, and as part and pertinent of, his property within the parish, in trust for the use of himself, his family, and tenants, subject to the proviso that the vindication of this right must not in any case be allowed to interfere with the undisturbed repose, for a sufficient and legitimate time, of bodies which have been interred; and that as the churchyard has been provided and is destined as a place of burial for the parochial community in general, no one save a parishioner is entitled to demand as a right burial accommodation within it (*a*). Such accommodation, if granted to one who does not fall within this category, is by way of permission, express or implied, on the part of the heritors, *qua* managers of the churchyard, and is a privilege which they seem only warranted in granting where it can be exercised without curtailing or prejudicing the use on the part of the parochial community of the *jus inferendi* in the churchyard which at law they possess.

CHAP. VI.
Principles of
allocation.

57. When, as is usually the case, the entire area of the churchyard has been already allocated and used as a place of burial, it sometimes happens that burial accommodation therein is applied for on behalf of persons for whose accommodation no ground at all has been allocated, or whose ground already allocated has become or is insufficient. Assuming such application to be made on behalf of those who are *entitled* to burial accommodation in the churchyard, the duty devolves on the managers of the churchyard to assign space for the purpose. This may be done either by supplying an increased amount of ground, or by re-allocating or by authorising the re-use of a portion of the existing churchyard. As the former expedient imposes on the heritors the obligation and consequent expense of enlarg-

Re-allocation
of graves.

(*a*) *Cunninghams v. Cunningham*, 1778, 5 Br. Supp. 415. See also per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at pp. 917, 918.

CHAP. VI.

ing the churchyard, which is only enforceable against them when circumstances render this necessary, so recourse will naturally be had to the latter expedient when the former is not necessary.

Principle on
which it rests.

58. The term *necessary*, as here used, is entirely relative in its meaning, and refers to a condition of moral fitness or propriety, not to one of absolute or material requirement. As already observed, law does not recognise a grave in the parish churchyard as a spot which is to be permanently tenanted by any one inmate, but, on the contrary, as the temporary resting-place of successive occupants. It is upon this principle that the right to re-allocate or re-use graves or lairs in the parish churchyard rests. When the interred body has, by the process of decomposition, been resolved into dust, the immediate purpose of its interment has been served. As a body it is gone. The space which it once filled is now unoccupied, and, while the spot is for ever sacred to the memory of the dead whose ashes there repose, law deems the grave vacant. When, therefore, a demand for burial accommodation occurs in such a condition of matters, the managers of the churchyard do, in certain circumstances, possess the right to allocate a grave thus vacated as the burial-place for another family, or to authorise its re-use as such for another body (*a*).

Occasion and
mode of re-
allocation of
grave.

59. The exercise of this right involves the discharge of a most delicate trust, and is perhaps only permissible to the effect of superseding or obviating the alternative obligation of enlarging the churchyard. When permissible, the right must always be exercised with the most scrupulous

(*a*) "When occasion calls for it, "old graves are opened up to receive "new tenants,"—per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 918. In *Wilson v. Brown*, 1859, 21 D. at p. 1064, Lord Wood says,—“Now that the heritors have a “large superintending power and “control in the distribution of lairs

“in the parish churchyard, so as to “make it available for the use of the “parishioners, and that there may “be occasions on which, in the exer- “cise of that right, they may be “entitled to assign to a different “party lairs formerly assigned to “another, cannot be disputed.”

and tender regard to the memory of the dead and the feelings of their relatives. Without some good reason, such as paucity of space, the heritors would not be justified in allotting the same lair as a place of burial for two different parishioners, even although at the time of the second allotment the remains of the body formerly interred may have returned to dust, and so the grave be legally vacant (*a*). On the one hand, re-allocation of a grave would be unwarrantable if there be unoccupied ground in the churchyard fit for allocation. On the other hand, even if there be none, no such interference with existing graves would be justifiable until after the period of sepulchral tenancy is at an end. When this condition cannot be observed, and there is no unallocated or unoccupied ground in the churchyard, then it would appear—additional burial accommodation being required—that such must be supplied by an enlargement of the churchyard at the heritors' expense.

Enlargement
of churchyard.

60. In the allocation and re-allocation of lairs and graves in the parish churchyard the body of heritors frequently, if not usually, act through the kirk-session (*b*); and they sometimes entrust the duty of allocating the lairs and managing the business details connected with the arrangement and disposal of the ground to their clerk, or to the minister, or even to the beadle or gravedigger (*c*). Although the strict regularity of such delegation may be doubted, still, possession of ground in a churchyard, by its occupancy as a place of burial for a considerable time, is calculated to overcome technical objections to the formality of its allocation (*d*). Indeed, long-continued possession of such burial-

Heritors act
through others.

(*a*) To this effect is the case of *Wilson v. Brown*, 1859, 21 D. 1060.

(*b*) Per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 918. *Steel v. St. Cuthbert's*, 1891, 18 R. 911.

(*c*) See *Wilson v. Brown*, 1859, 21 D. 1060.

(*d*) On this principle the judgment

in *Wilson v. Brown*, *supra*, seems to have proceeded. Here Lord Wood says, 21 D. at p. 1064,—“There seems to have been much irregularity in the management of the churchyard, which appears to have been to a great extent entrusted to the gravedigger and the heritors' clerk.”

CHAP. VI.

ground in the way now indicated will be held to presume, and will be practically treated as equivalent to, a formal allocation of it (*a*).

SECTION XII.—*Allottee's right in Ground allocated.*

Use as a place
of interment.

61. While it may be difficult to define the precise nature of the right which a heritor acquires in or to the lair or portion of ground allotted to him, it appears to be one which is directly qualified by the distinctive purpose which the churchyard generally is intended to serve; this purpose being that of affording burial accommodation to successive generations of the parishioners. Hence, while the right in question is, on the one hand, a right of use of the ground allocated, it is, on the other hand, only such a right of use of the ground as is consistent with its special and primary, and indeed exclusive purpose as a place of interment. That an allottee of ground in a churchyard, whether he be a heritor or merely a parishioner, does not by the allocation acquire a right of absolute property in it, seems abundantly plain in point of principle (*b*), and may now be regarded as conclusively fixed by judicial authority (*c*). It may further, perhaps, be safely assumed that the right is not one of property or ownership in the *solum* at all, but of use merely, although, from the sacred nature of the use, the allocation confers on the allottee a right to the exclusive possession of the ground so long as it is tenanted by the dead, or while unallocated ground exists in the churchyard which can be assigned as a place of burial.

Possession as
fortifying
right.

62. Long occupancy of the ground, by the burial within it of the allottee and his descendants for generations, will

(*a*) See per Lord Ordinary Kinloch in *Hill v. Wood*, 1863, 1 M'P. at p. 365, who says,—“There has not been “shown any express allocation; but “the use of burying appears to the “Lord Ordinary to imply such allocation being made.”

(*b*) See the reasoning of Lord

Ordinary Cringletie in his Note in *Ure v. Ramsay*, 1828, 6 S. at p. 917.

(*c*) *Hill v. Wood*, 1863, 1 M'P. 360. See *Russell v. Bute*, 1882, 10 R. 302; per Lord President Inglis in *Steel v. St. Cuthbert's*, 1891, 18 R. at p. 917.

fortify the right on the part of a member of the family to vindicate the right of continued exclusive possession of the ground against proposed adverse occupancy of it—especially when for a purpose inconsistent with, or different from, that of burial. In such a case, nothing short of necessity, or of high expediency amounting to constructive necessity, will justify any inversion of possession. On this principle, in the case of *Coupar-Angus* (*a*), the Court granted interdict at the instance of a heritor against the proposed erection of the session-house and vestry of a new parish church which the body of heritors had resolved to build on ground possessed by him, and long used as the family burying-place, no case of necessity for such interference with the ground being established to the satisfaction of the Court (*b*).

63. As the primary and appropriate, and indeed exclusive purpose for which ground in the churchyard is allocated is for burial, so the allottee may not apply it to a different purpose, or to one which is either inconsistent with that purpose or with the sacred character of the locality. Nay, more, the special use of the ground allocated, taken in connection with this other principle, that it forms part of the churchyard which is devoted as a place of burial for the inhabitants of the parish generally, involves this further doctrine, that the allottee may not so occupy the ground, even although in a manner consistent with the character of the locality, if such occupation of it will interfere with the convenient use, or curtail the otherwise available burial accommodation, of the churchyard, or is inconsistent with the religious sentiments of the community as symbolised in the National Church (*c*). This remark applies to the erection of tombstones or slabs over graves in memory of the deceased, and of enclosures around family burying-places. The latter

Mode of use of
ground by
allottee.

Erection of
tombstones,
&c.

(*a*) *Hill v. Wood*, 1863, 1 M'P. 360.
(*b*) *Cf. Steel v. St. Cuthbert's*, 1891,
18 R. 911, where the question was
one of enlargement of the church.

(*c*) *Wright v. Elphinstone*, 1881,
8 R. 1025; *Russell v. Bute*, 1882,
10 R. 302.

CHAP. VI.

erections, which were mainly designed to protect the bodies interred against violation, are not now required for this purpose.

Their erection,
how qualified.

64. Of these structures, therefore, as well as of tombstones and memorial slabs or monuments, it may be said that although quite congruous and becoming to the character of a churchyard, their erection is not essential to the due exercise of the *jus inferendi*, and is rather a matter of courtesy than of right (*a*). Hence, when such structures, from their size, number, or proximity, prevent convenient access for grave-digging, or afterwards at funerals; or when their presence curtails the otherwise available space suitable for burial accommodation, then their erection becomes inconsistent with the use which the allottees are entitled to make of their several lots of ground, and the managers of the churchyard would be justified in preventing their erection or requiring their removal. The removal of a gravestone peaceably and decently erected with consent of the managers of the burying-ground over a grave purchased with the money of the person there interred is illegal, unless some special circumstances render such removal necessary (*b*). One heritor or parishioner may interdict another from enclosing his lair in such a way as prevents access to the objector's grave, or renders access thereto very difficult, or practicable only in a way which is inconsistent with the respectful interment of the dead (*c*).

(*a*) A finding to this effect forms part of the judgment in *Cunninghams v. Cunningham*, 1778, 5 Br. Supp. 415. The doctrine is recognised by Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. at p. 918, and is expressed by Lord Deas in *M'Bean v. Young*, 1859, 21 D. at p. 321, in these words: "I have always understood the law to be that in a parish burying-ground no person is entitled to erect a monument where there was not one before without the sanction, express or implied, of the general body of heritors; but that if the general body of heritors assent no

individual heritor can object to appropriate erections or enclosures, so long as reasonable access is left through the burying-ground, although it may be more limited than before." See also per Lord Adam in *Wright v. Elphinstone*, 1881, 8 R. 1025; and in regard to glass shades and wire covering, see *M'Gough v. Lancaster Burial Board*, 1888, 21 Q.B.D. 323.

(*b*) *Wright v. Wright*, 1881, 9 R. 15.

(*c*) This is implied in *M'Bean v. Young*, 1859, 21 D. 314.

65. As being commemorative merely of the departed, without marking the spot of their interment, cenotaphs do not seem to be quite in keeping with the purposes of a parish churchyard. In regard to them accordingly, as well as to monuments and monumental structures generally which occupy any considerable space, it would appear that the consent of the heritors to their erection is requisite (*a*). CHAP. VI.
Cenotaphs.

SECTION XIII.—*Right of Property in the Churchyard, in whom vested.*

66. The observations of our institutional writers (*b*) and the judicial *dicta* expressed on this subject, seem to involve the doctrine that the right of property in the churchyard is vested in the heritors of the parish (*c*). What the precise nature of this right of property is, and what is comprehended under the term churchyard to which such proprietary right extends, has not perhaps been made matter of express decision, but it is clear that the proprietary right therein belonging to the heritors is one rather of trust than of absolute ownership (*d*). Fiduciary
right.

67. It may be perhaps assumed that those churchyards which existed as such prior to the Reformation then belonged in absolute property to the Popish clergy; and that on their transference to, and continued use by, the Reformed clergy and congregations as parish burial-grounds, the nature of the proprietary right therein remained much as it was before. In this view it has been suggested that the radical right of ownership in the ground may possibly be regarded as belong- Churchyards
prior to
Reformation.

(*a*) *Ibid.* per Lord Deas, 21 D. at p. 321.

(*b*) Stair, ii. 3, ss. 4, 39, 40; Ersk. ii. 3, 8.

(*c*) Robertson v. Salmon, 1868, 5 S.L.R. 405; Wright v. Elphinstone, 1881, 8 R. 1025; Russell v. Bute, 1882, 10 R. 302; Steel v. St. Cuthbert's, 1891, 18 R. 111. It is within the powers of the heritors of a parish

to compromise questions regarding the extent of the churchyard arising with a conterminous proprietor subject to the control of the Court at the instance of any one having a legitimate interest,—Fraser v. Turner, 1893, 21 R. 278.

(*d*) Cases in last note, and see per Lord President in Bain v. Seafield, 1884, 12 R. 62, 64.

CHAP. VI.

ing to the church—that vested in the body of heritors being of a fiduciary character merely, to the effect of enabling them, *qua* guardians, to protect and administer the subject (*a*). Whatever be the theory, however, as to the radical right, no difference exists as regards ownership as a burial-ground between a *pre*-Reformation and a *post*-Reformation burial-ground. The burial-ground, like the church, belongs to the heritors as trustees.

Churchyards
designated
since the
Reformation.

68. The right of ownership in the soil of a burying-ground, as distinct from ownership of the burying-ground as such, may belong either (1) to the heritors as trustees for the parishioners; (2) to the heritors in their own right, as the parties who furnished at their joint expense the ground for burial purposes; (3) to the owner or owners of the ground designed. On the one hand, the designation of the ground seems to imply the destination or constructive grant of it by the feudal proprietor for use as a place of burial for the deceasing parishioners; while, on the other hand, such use may be apparently satisfied and the purpose of the grant fulfilled by a use of its soil for burial accommodation from the surface downwards to a determinate and limited depth only.

Fiduciary right
in heritors.

69. Although Stair and Erskine, in the passages already cited, include churchyards within the category of allodial property, “the right of which,” as the latter remarks, “is fully “perfected by the designation of the Presbytery,” it does not appear that either writer intended to affirm to whom the radical or absolute right of property in ground designated as such belongs; while the general bearing of judicial opinion seems to be in favour of the view that the right thereto,

(*a*) The distinction here pointed at between churchyards existing prior to 1560 and those acquired by designation after that date, is alluded to by Lord Kaimes in *Town of Greenock v. Stewart*, 1777, *supra*, p. 174, note (*c*), and by Lord Ordinary Medwyn in *Heritors of South Leith v. Scott*,

1832, 11 S. at p. 78. In this case, the constructive transference of the ground from its former owners to its new administrators was strongly founded on by the kirk-session as amounting to an acquisition by them of the same right of property therein as existed prior to the Reformation.

which is vested in the heritors of the parish as a body, is of a fiduciary character merely (*a*). In any view the heritors cannot alienate the churchyard (*b*). It may be, however, that after a churchyard has long ceased to be used as such, and to be impressed with this character, the ordinary use of the ground revives (*c*). It was therefore suggested by Mr. Duncan that, while the designation of ground as a churchyard operates a constructive conveyance thereof to the heritors of the parish in trust for the purposes of burial, and, to a corresponding extent, burdens or entirely suspends the proprietary right in the subject on the part of its former owner, the radical right of property is still with him, and would again revive in the event of the ground ceasing to retain its character of a churchyard. But to this it may be answered that the whole body of heritors contribute to the purchase of the designated ground (*d*).

(*a*) Thus, in *Cunninghams v. Cunningham*, 1778, 5 Br. Supp. 415, Lord Covington found, "That the property of the churchyard, as of the church itself, *belongs to the heritors* having property lands in the parish, as part and pertinent of their property lands, *for the interest* of those in their respective families and other inhabitants upon their several properties," &c. In *Heritors of South Leith v. Scott*, 1832, 11 S. 78, Lord Ordinary Medwyn says, — "It is only since the Reformation that the burden of maintaining churches and churchyards, and furnishing additional ground for the latter where necessary, has been laid upon the heritors, and that they have in consequence *come to have a right of a qualified nature* in these subjects." The same principle was recognised in the cases cited *supra*, p. 203, note (*c*). In *Mansfield v. Wright*, 1824, 2 Shaw, App. 104, not reported in Court of Session, authority was obtained from the Presbytery of Perth in 1784 to remove the church and the churchyard of the parish of Seone, situated on the Moot-hill belonging to Lord Stormont. A new

church having been built elsewhere, surrounded by a piece of ground which was enclosed and used as a churchyard, authority was again obtained from the Presbytery to take down this church and build it in another part of the parish. In an action raised to vindicate a right of access to this last-mentioned burial-ground, Lord Craigie remarked, p. 107, — "From 1784 to 1804 every person dying in the parish had right to be buried there; but in that year a new churchyard was furnished, and the ground of the former one being no longer occupied, *returned to the Earl free and unburdened, excepting that it should not be disturbed till the remains of the bodies there interred should have returned to their original dust.*" But *cf.* the *dicta* in *Bain v. Seafield*, 1884, 12 R. 62; *Russell v. Bute*, 1882, 10 R. 302; *Wright v. Elphinstone*, 1881, 8 R. 1025.

(*b*) Cases at end of note.

(*c*) Ersk. ii. 1, 8.

(*d*) Lord Hailes touches upon this subject in *Town of Greenock v. Stewart*, *cit.* p. 174, note (*c*).

SECTION XIV.—*Right to Subjects beneath, and Produce of the Churchyard.*

If right be
from centre to
surface or not.

70. If, in the case of ground designated as a churchyard, the radical proprietary right therein from the surface to the centre be, by the act of designation, transferred from the former owner, it would seem to follow that the right to all subjects beneath the soil, such as minerals, is acquired by the parochial community; and that, except in so far as required by way of support to the superincumbent stratum of burial accommodation soil, the body of heritors or kirk-session, *qua* managers of the churchyard, may at pleasure remove and dispose of the same, and apply the money thence derived in a legal way. On the other hand, if the radical right in the ground, or at least in so much of it as is not required for burial accommodation, remain with its former owner, then it would seem to follow that the minerals are still his property; and that when so situated as that their removal will not interfere with or endanger the use of the ground above *qua* churchyard, he may work the same and apply the price thereof for his own behoof.

Opinions by
legal writers on
the point.

71. Mackenzie refers to the subject without expressing any distinct opinion (*a*); and the point does not seem to have been made matter of decision or judicial *dictum*. Forbes appears to think that minerals—of which he instances coal—found in the churchyard could not be wrought at all, as to do so, he considers, “would not only spoil the ornament of “the churchyard, but also invert the use on’t” (*b*). This reason, however, is not necessarily well founded, and in many cases would be wholly inapplicable. Dunlop remarks that “if coal “could be worked (which might often be the case) without “interfering in any way with the surface, or the proper and “decent use of the churchyard as such, it would probably be “held that the heritors might dispose of the coal under it,

(*a*) Mack, Obs. on the Act 1597, c. 232, p. 293.

(*b*) Forbes, Tithes, p. 215, foot.

“ the profits being applied to some permanent parochial purpose ” (*a*).

72. As regards the produce of the churchyard, it appears at one time to have been held that grass grown thereon belonged to the parochial community ; and that the cropping of the grass might be let and the proceeds thereof applied to pious uses within the parish (*b*). But subsequently it was found that the grass grown on the churchyard, with any rent derived from it, belongs to the minister (*c*). Bankton and Forbes lay down a similar doctrine (*d*). Such pasturage, however, is not taken *in computo* in the designation of “ minister’s grass ” (*e*) ; and, on a similar principle, it was at an earlier date ruled that it might not be assigned to the incumbent as stipend by the Commissioners of Plat (*f*).

To whom grass belongs.

73. Judicial opinion supports the view that the heritors are entitled to cut down, and also apparently to dispose of trees growing in the churchyard (*g*). Forbes expressly says that the minister is not entitled to cut down such trees, although he has a good title to prevent others from doing so (*h*).

To whom trees belong.

SECTION XV.—*Parish Churchyards, how far Subjects of Commerce.*

74. Although parish churchyards are not by our law reckoned *res religiosæ* in the same sense or to the same effect as places of burial under the Roman law, which unqualifiedly exempted them from the domain of commerce, there are two principles which operate to exclude church-

Not subjects of ordinary property.

(*a*) Dunlop Par., 3rd ed. p. 84.

(*b*) Bass v. Young, 1609, M. 8019. See also per Lord Hailes in Town of Greenock v. Stewart, 1777, *cit.*, who lays down a similar doctrine.

(*c*) Hay v. Williamson, 1778, M. 5148 ; Spence v. Hall, 1 Dec. 1808, F.C.

(*d*) Bank. ii. 8, 194 ; Forbes, Tithes, p. 215.

(*e*) Beaton v. Dallas, 1734, Elchies, *Glebe*, I.

(*f*) Bass v. Young, 1609, M. 8019.

(*g*) Per Lord Hailes in Town of Greenock v. Stewart, *cit.* ; and Lord Alloway in Ure v. Ramsay, 1828, 6 S. at p. 920.

(*h*) Forbes, Tithes, p. 215.

CHAP. VI.

yards to a great extent from being dealt with as subjects to which the ordinary rights and privileges of proprietorship belong. These principles are—(1) the *quasi* religious character impressed on the ground arising from the special and sacred nature of the use to which it is devoted; and (2) the limited community for whose behoof exclusively the parish churchyard is intended. The effect of designation, actual or constructive, of ground as the churchyard is to sequester it from the ordinary uses of property, and to confine it exclusively to those of burial for the deceasing inhabitants of the parish to which it belongs.

How far *extra commercium*.

75. Hence, the body of heritors, as has already been pointed out, cannot alienate the churchyard, and they cannot themselves apply the ground to a purely secular use, such as for a garden, a market, or a place of amusement, or to use as a place of dissenting worship; neither can they authorise or permit the ground to be so used by another—whether a parishioner or not—by way of tolerance or express permission, or under cover of a sale or disposition of the ground to him for such a purpose. To this or to any such effect the churchyard, while it continues such, is *extra commercium* (a). In addition to this, however, the nature of each heritor's right to the allocation of a portion of the area of the churchyard as a place of burial for his family and tenants tends still further to limit the extent to which the subject is capable of being disposed of. This right of allocation—being of the nature of an adjunct or pertinent of that of ownership of lands within the parish—operates, in combination with the principles already noted, to render incompetent, because unwarrantable, the sale or gift to one who is neither a heritor nor a parishioner of a right of

(a) Craig, *Jus Feudale*, says l. i. dieg. 15, s. 11, "Neque enim hodie
"jura cœmeteriorum et sepulchrorum
"quæ publice instituta sunt, in com-
"mercio huminum esse, aut alienari,

"locari, aut in feudum dari possunt."
Russell v. Bute, 1882, 10 R. 302;
Wright v. Elphinstone, 1881, 8 R.
1025. See also per Lord President in
Bain v. Seafield, 1884, 12 R. 64.

property in, or use of the ground of, the churchyard even for the purposes of burial.

76. These principles, however, do not seem to go the length of excluding ground in the parish churchyard from being the subject of a grant of *quasi* property, or of use in perpetuity. To this effect the ground of the churchyard, even while it continues such, appears at one time to have been held to be *in commercio*, and “conveyable by infestment,” and possibly even affectable by creditors (*a*); but later authorities favour the view that private right is limited to that of exclusive use for family burial so long as no absolute necessity for any other appropriation of the ground exists (*b*). In point of practice, the sale to a heritor of ground in the churchyard for a family burying-place, or the allocation of a lair therein to a parishioner for a price, is not of infrequent occurrence (*c*). The object of such a sale or onerous allocation seems to be to confer on the donee a right of exclusive occupancy of the ground in the churchyard, even although he cease to be a heritor or inhabitant of the parish, and so to exclude it from being subject to allocation to any other of the parishioners, so long, at all events, as there is other available ground (*d*), or from passing, *qua* pertinent of his lands, to their new proprietor (*e*). In so far as the heritor and his family are concerned, various considerations recommend the propriety and convenience of such an arrangement, although it seems somewhat to trench on strict legal principle (*f*).

To what effect
in commercio.

Sale of ground
in churchyard.

(*a*) See *Lithgow v. Wilkieson*, 1697, M. 9637; and *Monteith v. Hope*, 1695, 4 Br. Supp. 261, both, however, unsatisfactorily reported cases, and of doubtful authority. In this latter case the subject of the conveyance was a burial-place in the church of Falkirk.

(*b*) *Russell v. Bute*, 1882, 10 R. 302, and authorities there cited. See also *Steel v. St. Cuthbert's*, 1891, 18 R. 911.

(*c*) Instances to this effect occur in

Heritors of South Leith v. Scott, 1832, 11 S. 75, and *Wilson v. Brown*, 1859, 21 D. 1060.

(*d*) *Wilson v. Brown*, *cit.*

(*e*) *Steel v. St. Cuthbert's*, 1891, 18 R. 911.

(*f*) This principle being, that no one can sell or dispose of his property in the parish and retain his allocated area of the churchyard any more than of the church.—See per Lord Ordinary Cringletie in *Ure v. Ramsay*, *supra*, 6 S. at p. 917-918.

CHAP. VI.

SECTION XVI.—*Excambion and Transportation of Churchyards.*

Nature and
effect of an
excambion.

77. Circumstances sometimes occur which render necessary or highly expedient, or otherwise justify, a change in the situation of the parish churchyard. An alteration of this kind may be effected either by way of excambion or by that of transportation. Both processes result in a change of the site of the churchyard; but they differ essentially in the means by which such change is effected. In the case of an excambion the ground of the existing churchyard is, by way of special contract between the body of heritors on the one hand and the owner of the ground selected on the other, given *to* him by the heritors in exchange for a corresponding portion of ground given *by* him to the heritors, for use thereafter as the parish churchyard. In this case the ground is not furnished by the body of heritors under the obligation imposed on them by law to provide a churchyard. It is merely *substituted* for ground which has been already provided for this purpose. Very exceptional circumstances, however, are required to warrant the excambion either of a parish churchyard or of any portion of the same (*a*).

78. From the nature of the subject it must be of rare occurrence that any proprietor will be inclined to accept a churchyard in exchange for ground belonging to him which is suitable as a place of interment for the parishioners. But in the case of Scone (*b*) an instance occurs in which such a transaction was authorised by the Presbytery; and, although the formal contract of excambion there executed seems to have been limited to the area of ground on which the church stood, it would rather appear that the Court dealt with the case as one in which an excambion had been

(*a*) Russell v. Bute, 1882, 10 R. 302.

(*b*) Mansfield v. Wright, 1824, 2 Shaw, App. 104, not reported in Court of Session. The transaction, in so far as it involved an excambion

of the churchyard, was of questionable legality. Cf. Russell v. Bute, 1882, 10 R. 302; Wright v. Elphinstone, 1881, 8 R. 1025; Bain v. Seafield, 1884, 12 R. 64.

practically effected of the ground, also on the Moot-hill, which prior to 1784 formed the site of the parish churchyard.

CHAP. VI.

79. No authority is by any legislative enactment conferred either on the body of heritors or the kirk-session of the parish, or on the Presbytery of the bounds, to effect an excambion of the churchyard. It may, however, be that in exceptional circumstances heritors do possess powers in this matter similar to those of the Presbytery in the case of the excambion of the glebe. If so, the remarks elsewhere made in reference to the nature and mode of carrying out of such a transaction, and the mode in which it is completed, will apply generally to the case of a churchyard.

Heritors' powers.

80. While an excambion of the churchyard operates practically as a designation of the new ground as the parish place of burial, and terminates the existence of the old ground as a place of interment thereafter for the parishioners, it does not at once suppress its sacred character or secularise it, so that it may be immediately applied to the ordinary uses of property. On the contrary, it would appear that no acts of occupation of or interference with the ground are permissible which may disturb the repose of the bodies therein buried, or do violence to the feelings of becoming respect for their memory. When, however, dust has returned to dust, according to some earlier authorities, the ground is divested of its sacred character, and may, subject perhaps to some restriction, be applied to secular uses (*a*), but the tendency of later authority seems to be to uphold the sacred character of the ground (*b*).

Old ground, whether secularised.

(*a*) See Ersk. ii. 1, 8, and per Lord Craigie in *Mansfield v. Wright*, *supra*, 2 Shaw, App. 107. In this case, however, Lord Justice-Clerk Boyle expresses a very confident opinion to an opposite effect apparently. He says (p. 108),—"It is clear "as the sun at noon-day that by the "common law no person can interfere "with these graves, or do anything

"affecting the ground, that can tend "in any way to injure the feelings of "the connexions of those who are "there interred. No one has a right "to break up the ground of interment to the remotest periods of "time. There the dust must for ever "remain."

(*b*) See cases in note (*b*), p. 210.

CHAP. VI.

Transportation
of churchyard.

81. When circumstances render expedient a change in the site of the parish church, ground around or near it is sometimes provided by the heritors, and designated by the Presbytery as that in which the parishioners are thereafter to be buried. The result of this transportation of the churchyard is either partially or entirely to supersede the use thereafter of the old churchyard as a place of interment, although not necessarily to suppress it as such. The ground may still remain entirely sequestered from the common uses of property, and continue under the immediate guardianship and management of the heritors or kirk-session of the parish (*a*).

On union of
parishes.

82. A transportation of the churchyard may also be conveniently made on the union of two or more parishes when a specified building, erected or to be erected, is declared to be, and is thereafter to be used as, the parish church of the new or united parish. Such is sometimes a convenient occasion also on which to appropriate ground already provided or to be provided in connection with the parish church as that which is thereafter to constitute and be occupied as the parish churchyard. It has frequently happened, however, that parishes have been united without any such arrangement being made; and unless circumstances render necessary or highly expedient a change to this effect, it seems in every point of view better that the conditions of the occupancy and use of the old burial-ground should remain undisturbed. In various instances, accordingly, when parishes were united, the former churchyards were declared to continue the burial-places of the respective parishes after their union, just as they had been before it (*b*). The Teind Court does not seem to possess any primitive jurisdiction, as in the case of churches, in regard to the transportation of parish churchyards (*c*).

Teind Court
no primitive
jurisdiction.

(*a*) See *Wright v. Elphinstone*, 1881, 8 R. 1025.

(*b*) See cases of *Kirknewton* and *East Calder* in 1751, *Liff and Benvie* in 1753, and in *Swinton and Simprim*

in 1761.—*Connell Par.* pp. 161-9, and 177-9.

(*c*) See *Maitland v. May*, 1766, 1 Hailes, 109.

Such jurisdiction appears to be vested in the Presbytery of the bounds, subject to a review of their deliverances by the Civil court in a statutory appeal (*a*). CHAP. VI.

SECTION XVII.—*Burial within the Parish Church.*

83. The regulation issued by ecclesiastical authority in the ninth century against the use of the church as a place of burial (*b*) does not seem to have been very strictly complied with in Scotland, as it would appear that the interment of the dead within parish churches in this country prevailed to a considerable extent prior to, as well as for some time after, the Reformation. To repress the practice, an Act of Assembly was passed in August 1588, which declared that ministers should not give consent to, but, on the contrary, should directly oppose the burial of the dead within churches, certifying that the inbringers of the dead within the church should be suspended from the benefit of the kirk till they made public repentance, and the minister who connived at or did not oppose such burial should be suspended from the freedom of the ministry. For the better execution of the Act it was declared therein that application should be made to His Majesty for an ordinance to be passed by his Highness and Council forbidding, *inter alia*, burials in churches and the erection of tombs therein (*c*). This Act of Assembly was followed by others of similar import, including one in 1643 (*d*). No statute, however, was passed to the above effect; and although the practice alluded to may be said to exist no longer, its abandonment is not due to express legal prohibition. Ecclesiastical prohibitions.

84. Bankton lays down the doctrine that right to a burial-place in a part of the church may be acquired by prescription (*e*). A right of this kind was recognised by judicial Burial in church, if legal.

(*a*) 31 and 32 Vict. c. 96.

(*b*) See *ante*, p. 172.

(*c*) See Book of the Universal Kirk, by Peterkin, p. 334.

(*d*) See Acts of Assembly, 1643, Session IX., and Pardovan, b. ii. tit. 7.

(*e*) Bank. ii. 8, 193.

CHAP. VI.

authority in 1743 (*a*); and Connell, writing in 1823, says that the burial of the dead within the building was then "tolerated in various churches in Scotland" (*b*). But the interment of the dead generally, or even occasionally, within churches is so inconsistent with the proper use of the building, and on sanitary grounds so objectionable, that it can hardly be imagined that a court of law would now sanction such a practice.

Case of
Linlithgow.

85. The case of Linlithgow in 1817, which it is believed is the last case bearing on the subject, corroborates this view. In an old aisle forming part of the building, but situated in a recess and not furnished with seats, one family in the parish, named Hamilton, had from time immemorial been in use to be interred, while other families had used the body of the church as a place of burial. A resolution by the heritors was subsequently passed condemning the practice, in which all acquiesced save Mr. Hamilton, who brought a declarator before the Court of Session for vindicating his alleged right to bury in the aisle, which he rested (1) on an alleged old grant to this effect from the kirk-session to an ancestor, and as being an adjunct of his property in the parish; and (2) on immemorial possession,—maintaining separately, in further support of his claim, that the aisle was not properly a part of the church. After a proof, the Lord Ordinary (Pitmilley) pronounced an interlocutor finding, *inter alia*, that the practice of burying in churches was illegal, and assoilzieing from the conclusions of the action. Upon a representation, with answers, this interlocutor was adhered to, and the judgment was acquiesced in (*c*). In the case of Duddingston, in 1832, it was laid down as the law of Scotland "that the dead may " be buried in churchyards, though not in churches" (*d*).

Case of
Duddingston.

(*a*) See *Monteith v. Hope*, 1695, 4 Br. Supp. 261, and *Chalmers v. Cathcart*, 1743, referred to by Bankton, *supra*, and mentioned in Connell Par. Supp. p. 104.

(*b*) *Ibid.* 105.

(*c*) Connell Par. Supp. p. 107.

(*d*) Per Lord Ordinary Mackenzie in *Kirk-Session of Duddingston v. Halyburton*, 1832, 10 S. at p. 198, footnote.

SECTION XVIII.—*Dues payable on Interment in Parish Churchyard.*

CHAP. VI.

86. While the strict application of the principles which regulate the allocation of ground in the parish churchyard can scarcely be said to warrant the exaction of a price for the right of burial therein on behalf of the parishioners (*a*), certain dues were notwithstanding sometimes payable—generally to the kirk-session—on the occasion of an interment, and in some parishes immemorial usage may still sanction such payments. These dues or emoluments were connected chiefly with the appropriation of lairs (*b*) and the use of mortcloths, or were levied as burial fees. The proceeds of such dues or fees were commonly devoted to the support of the poor of the parish. Hence the origin of these exactions has been attributed to the connivance of the heritors, who saw in them the means of relief to some extent from their liability in the obligation alluded to (*c*).

For what dues exacted.

How applied.

87. In the case of Kilwinning, in 1718, the Court found that the kirk-session of the parish had the sole power of lending out mortcloths for hire for the benefit of the poor, and that the poor had right to the money arising therefrom (*d*). To a similar effect is the judgment in the subsequent case of Kippen, in 1756 (*e*). Immemorial usage by a corporation, or even by a society not incorporated, seems to have conferred on it a concurrent right along with the kirk-session to let out mortcloths for hire (*f*); and it would rather appear that

Mortcloth dues.

Right acquired by prescription.

(*a*) In *Town of Greenock v. Stewart*, in 1777, *cit.* p. 174, note (*c*), Lord President Dundas remarks, 2 Hailes, 759,—"I do not see why money should be paid for *layers*. Burying ought to be free, and I did not know that there was any such exaction in Scotland."

(*b*) An example of this occurs in *Wilson v. Brown*, 1859, 21 D. 1060.

(*c*) See per Lords Hailes and Braxfield in the case of *Greenock*, *supra*.

(*d*) *Kirk-Session v. Trades of Kilwinning*, 1718, mentioned in the case next cited.

(*e*) *Turnbull v. M'Laws*, 1756, M. 8013. In the unreported case of *Orwell*, in 1803, a certain portion of the poor's funds in the hands of the kirk-session of the parish was derived from the dues paid to them for the hire of mortcloths,—*Black v. Kirk-Session of Orwell*, 20th Dec. 1803—see Session papers, 111 Campbell's Coll. No. 5, p. 3.

(*f*) *Kirk-Session of Dumfries v. Incorporation of Squarmen*, 1783, M. 8018; *Heritors of South Leith v. Scott*, 1832, 11 S. 75.

CHAP. VI.

such corporation or society was bound, like the kirk-session, to apply the dues thence derived towards relief of the poor of the parish (*a*).

SECTION XIX.—*Transference of Churchyard to Parish Council.*

Transference
authorised by
Act of 1894.

88. Provision is made by the Local Government (Scotland) Act, 1894, for the voluntary transference of the parish churchyard by the heritors to the Parish Council, if that body is willing to accept the transfer. The effect of this transference is that the Parish Council comes in place of the heritors, with all their powers, duties, and liabilities, of which the heritors are relieved, excepting any power or duty of enlarging the churchyard and assessing therefor. Debts and liabilities already incurred are not transferred. The costs of maintenance are to be a charge upon the poor's-rates. This provision is applicable to all parish churchyards vested in the heritors, and there is no ground for the distinction which has been suggested between Reformation and post-Reformation churches.

SECTION XX.—*Public Burial-Grounds or Cemeteries.*

Churchyards
and cemeteries
contrasted.

89. Parish churchyards occupy an intermediate position between private burial-places on the one hand, and public burial-places, or cemeteries, on the other. Inasmuch as the churchyard is not confined in its use to the interment of any one individual or his family, but is appropriated for the burial accommodation of a considerable class, all of whose members possess a common right of sepulture therein, it cannot be with accuracy styled a private burial-place. At the same time, as those for whose use each separate churchyard is provided form a distinct and limited section of the community, churchyards cannot be termed public burial-places in an unqualified sense of that expression. This term more

(*a*) *Ibid.* per Lord Ordinary Medwyn, 11 S. at p. 79.

correctly applies to portions of ground set apart for the purposes of interment, in which any number of the public may by purchase acquire a right either of property or of use. Some cemeteries are of a more private character than others (*a*); but in all of them the origin or foundation, if not the extent, of the right acquired in or to the ground differs from that which obtains in the case of parish churchyards. The right on the part of the parishioners to bury in the churchyard arises *ex lege*, and distinctively consists in the temporary, or at least the terminable, occupancy of the grave. On the other hand, the right of sepulture possessed by a member of the public in a cemetery arises *ex contractu*; and although it may amount to a *jus inferendi* merely, it is generally a perpetual right in a certain portion of the area.

90. This right, however, is not absolute, but qualified in its nature. In the general case the right is not one of property either at common law or *ex contractu* in the lairs allocated, but only a right to use the same in perpetuity for the purpose of sepulture, with a corresponding obligation upon the proprietors of the cemetery to dedicate the cemetery exclusively to the same purpose (*b*). The right is understood to be granted and accepted under the condition that the ground is to be used for the purposes of burial, or at least that it is not to be used for purposes or in a manner inconsistent with the becoming quiet and solemnity of the place. Neither the cemetery nor any part of it may be converted into a place of merchandise or amusement. The allottees of the ground may not put anything there which is inconsistent with the proper burial or the undisturbed repose of the dead. They may not even erect there any building which is quite foreign to the character and associations of the spot. Lair-holders have a title to sue the owners of the cemetery in support of their

Right of
allottee in a
cemetery.

(*a*) This remark applies to burial-ground provided in connection with a particular chapel, and intended

exclusively or chiefly for the use of its members and their families.

(*b*) *Cunningham v. Edmiston*, 1871, 9 M'P. 869.

CHAP. VI.

Right to erect
monuments or
cenotaphs.

Cemeteries
may be formed
within
parishes.

own individual interests, but not as representative of a common interest on behalf of others (*a*).

91. Apart from these conditions, however, which must be complied with, the right of use of the ground within the cemetery is less circumscribed than in the parish churchyard. In particular, allottees of the former may apply the ground to other purposes than those of burial alone. They may as matter of right erect monuments thereon; and this not merely over bodies there interred, but in memory of the dead who repose elsewhere (*b*). The proprietors of the cemetery are entitled to derive a reasonable profit from burial fees (*c*). As the use of the churchyard by the parishioners is rather a privilege competent to than an obligation enforceable against them, so neither the body of heritors nor the kirk-session of the parish can prevent the formation of cemeteries within their bounds, nor the interment therein of the parishioners instead of in the churchyard (*d*). This seems to hold good even in the case where burial elsewhere than in the churchyard will deprive the kirk-session of dues which they would otherwise obtain (*e*). Whether the conversion of ground into and its use as a burial-place amounts to a nuisance, and is on this ground objectionable, is a question of fact to be determined by the judge or jury according to the circumstances disclosed (*f*).

SECTION XXI.—*Private Burial-Grounds.*

Owner's right
absolute.

92. As the term indicates, a private burial-ground denotes a place of sepulture devoted by its owner to the interment of himself and his family, or of those to whom he may extend the privilege. The right of property in the ground being

(*a*) *Cunningham v. Edmiston*, 1871, 9 M.P. 869.

(*b*) These remarks are supported by the judgment pronounced, and *dicta* expressed in *Paterson v. Beattie*, 1845, 7 D. 561.

(*c*) *Cunningham v. Edmiston*, *supra*, 9 M.P. 869.

(*d*) *Kirk-Session of Duddingston v. Halyburton*, 1832, 10 S. 196.

(*e*) *Ibid.* per Lord Ordinary Mackenzie, 18 S. at p. 197, footnote.

(*f*) *Swan v. Haliburton*, 1830, 8 S. 637.

absolute, its owner may consult his own wishes and feelings exclusively in the disposal of the dead; or he may at pleasure cease to use the ground as a place of interment. Interference on the part of others with his conduct in these or other like respects is incompatible with his proprietary right in the subject, and is competent only when the exercise of this right offends against public decency, or is prejudicial to the sanitary condition of the neighbourhood, or to the patrimonial rights of third parties. Private burial-places, it has been said, are not reckoned *inter res religiosas* (a).

93. When a proprietor disposes an estate in which a private burial-place is situated, without special stipulation on the subject, questions sometimes arise regarding (1) the nature and extent of the former owner's interest in ground after the sale; and (2) the disponent's right of interference with or occupation of the soil. On the one hand, the interment of a dead body secures for it a right of sanctuary, and renders, at least for a time, the place of its repose inviolable; while, on the other hand, it necessarily creates a strong interest in and bond of attachment to the spot on the part of surviving relatives. The operation of the former principle tends to restrain the disponent from interfering with or disturbing the state of occupancy of the ground until after the tenancy of the graves is at an end, and the bodies therein laid have returned to dust. The operation of the latter principle tends to confer on the near relatives of the buried dead the privilege during a similar period of access to the spot at reasonable times, so far as this can be exercised without prejudicing or seriously interfering with the rights and arrangements of the proprietor. A doctrine to this effect was recognised in the case of *Scone* (b), with this addition, that the proprietor of the ground, which had formerly been a parish churchyard, was held to be bound to enclose the

Sale of estate having a private burial-place.

Case of *Scone*.

(a) Craig, *Jus Feudale*, l. i. dieg. 15, s. 11; *Bank*. i. 3, 12.

(b) *Mansfield v. Wright*, 1824, 2

Shaw, App. 104, not reported in Court of Session.

CHAP. VI.

burying-place with a suitable enclosure—in this instance, a stone fence or railing. Here the action to enforce the right to obtain access to the ground, and the obligation to enclose it, originated in a summary petition to the Sheriff.

SECTION XXII.—*Right of Sepulture as acquired by Prescription.*

Forty years
use of burial.

94. The right of sepulture may, it was suggested by Mr. Duncan, be acquired by a family, or a number of individuals, in ground not belonging to them, in virtue of possession thereof, by way of the burial therein of their relatives for a period of forty years, but the authorities cited by him (*a*) hardly bear out that view. Such a right of sanctuary for the dead may, however, be acquired as will either prevent the proprietor of the ground from interfering with the bodies interred in it; or, if their exhumation become necessary, will impose on him the obligation of re-interring their remains in such an immediately neighbouring spot as will involve the least possible amount of removal, and in such a manner as will do the least violence to the feelings of the relatives of the deceased (*b*).

Challenge of
right by feudal
owner.

95. Whether the interest acquired by use of burial for the prescriptive period will *per se* entitle a party to continue to bury in the ground, after challenge by the person who holds it by a formal feudal title, does not seem to be decided. Possession alone, though for upwards of forty years, does not, as a general rule, confer a right to a heritable subject; and probably this rule suffers no exception in the case where the heritable subject consists of ground which has been occupied as a place of burial (*c*). If so, it would seem to follow that

(*a*) See *dictum* by Lord Benholme in *Hill v. Wood*, 1863, 1 M'P. at p. 373; *Officers of State v. Ouchterlony*, 1823, 2 S. 437, *affd.* 1 W. & S. 533; *Lovat v. Fraser*, 1845, 8 D. 316.

(*b*) *Officers of State v. Ouchterlony*, *supra*.

(*c*) The bearing of the decision in the case last cited tends apparently to support this view. Here the real question between the parties referred to the right of property in the area of the abbey, in which the defender's ancestors had for above forty years

the right acquired by prescription in ground—not being a parish churchyard—is rather retrospective than prospective in its effect—that it serves rather to protect the remains of bodies already interred, and preserve, at least for a time, the *status quo* or existing condition of the ground, than to confer a right of continued or renewed use of it for the future, in defiance of the right of absolute ownership vested in the feudal proprietor.

CHAP. VI.

96. The right of burial, where it exists, does not appear susceptible of being lost by non-use, though for the prescriptive period. Such a right seems, *res meræ facultatis*, to be used or not as it may be wanted, and is therefore not liable to be lost by the negative prescription (*a*). When the title of a party, averring himself to be proprietor of ground, the use of which is claimed by other persons pleading a prescriptive right of sepulture therein, is denied, a declaratory action, and not a suspension and interdict, is the proper form of process in which to have the conflicting rights investigated and determined (*b*).

Right of burial
not lost by
non-use.

Form of action
to try right.

SECTION XXIII.—*Scope of the Burial-Grounds (Scotland)*
Act, 1855 (18 and 19 Vict. c. 68).

97. The objects of this statute are to confer a power (1) to close existing burial-grounds in certain cases, and (2) to provide other or additional burial-grounds. The Act seems to include within its provisions parish churchyards, intramural places of burial, and churchyards attached to chapels, as well as public cemeteries and private burial-places.

To close and
provide burial-
grounds.

98. The administration of the Act is entrusted to the following local authorities. In burghs returning or contributing to return a Member to Parliament, the local authority

Burial
authority.

been interred; and while this prescriptive use of burial conferred on the bodies there interred a right of sanctuary, the right of property in

the ground was decided to be in the pursuers.

(*a*) Per Lord Mackenzie in *Paterson v. Beattie*, 1845, 7 D. at p. 569.

(*b*) *Lovat v. Fraser*, 1845, 8 D. 316.

CHAP. VI.

is the Town-Council (1) if the parish and burgh are co-extensive; (2) if the burgh contains parts of two or more parishes (in which case the burgh area becomes practically a new parish for burial purposes); (3) if the burgh contains only part of one parish, and the Sheriff, as explained in next article, has determined that the whole parish shall be treated as burghal. In all other cases the burial authority under the Acts is the Parish Council (*a*).

Landward-
burghal parish.

99. When a parish is partly within and partly without a burgh returning or contributing to return a Member to Parliament, the Sheriff of the county within which it is entirely or principally situated may, on application to him by (1) any two members of the Parish Council; or (2) any ten persons assessed for relief of the poor in the parish; or (3) two or more householders residing within 100 yards of an existing or proposed burial-ground in the parish, and on the required notice being given, and on hearing parties interested, determine whether such parish is to be held as within or without the burgh for the purposes of the Act. The Sheriff's determination on the point is equivalent to a statutory declaration to this effect; and no renewed application on the subject is competent till after five years from the date of his interlocutor. The notice above referred to is by advertisement in the Edinburgh Gazette, and in such local newspapers as the Sheriff may appoint (*b*).

SECTION XXIV.—*Suppression of existing and prevention of proposed Burial-Grounds.*

Petition to
Sheriff.

100. A petition at the instance of (1) any two members of the Parish Council; or (2) any ten persons assessed for relief of the poor in the parish; or (3) any two householders residing within 100 yards of the site of an existing or pro-

(*a*) 18 and 19 Vict. c. 68, ss. 2 and 3; 19 and 20 Vict. c. 103, s. 69; 29 and 30 Vict. c. 50, s. 1.

(*b*) 18 and 19 Vict. c. 68, s. 3.

posed burial-ground, may be presented to the Sheriff of the bounds, setting forth that the same is, or would be, either (1) dangerous to health, or (2) contrary to decency. Thereupon the Sheriff shall fix a day (*a*) for inquiring into the matter, and appoint intimation (*b*) of the petition. If, on hearing all parties deemed to have an interest, he thinks the facts alleged in the petition proved, he is to pronounce an interlocutor to this effect, and transmit a copy thereof to the Secretary for Scotland (*c*).

101. In pursuance of such interlocutor, and on the representation of the Secretary for Scotland, His Majesty may, by an Order in Council, direct that no new burial-ground shall be opened within certain specified limits, save with the approval of the Secretary for Scotland; or that interment in certain burial-grounds shall be wholly or partially discontinued. Notice, however, of such representation, and of the time when it is to be considered by the Privy Council, must be transmitted (*d*) to the Crown Agent in Edinburgh, and the Sheriff-clerk of the county in which the burial-ground is situated, and shall be by them respectively published in the Edinburgh Gazette, and fixed on the doors of the parish church, or on some other conspicuous place within the parish, one month before the representation is considered by the Privy Council (*e*).

Order in
Council.

102. Any one burying, or assisting in or permitting the burial of a body contrary to an Order in Council is liable for each offence to imprisonment for two months, or to a fine not exceeding £20 (*f*).

Penalty for
contravention.

103. Unless expressly therein mentioned, no Order in Council shall apply to ground used exclusively for the interment of (1) Quakers, or (2) persons of the Jewish persuasion,

Ground
excepted from
Order.

(*a*) Not less than ten or more than twenty days from date of presenting the petition.

(*b*) Similar to that required by s. 3, as above stated, p. 222.

(*c*) 18 and 19 Vict. c. 68, s. 4.

(*d*) The Act does not say by whom.

(*e*) 18 and 19 Vict. c. 68, s. 5.

(*f*) *Ibid.* s. 6.

CHAP. VI.

or (3) to a private burial-place (*a*). When at the date of the Act any person is "entitled to a right of interment" in a spot within the burial-ground affected by the Order, a special licence to exercise such right, when not injurious to health, may be granted by the Secretary for Scotland, subject to such conditions as he may impose, and revocable at any time (*b*).

Renewal of
petition.

104. When a petition to the Sheriff to the above effect has been dismissed, no renewal of it, except with concurrence of the procurator-fiscal, is competent till after the lapse of five years from its date (*c*).

SECTION XXV.—*Providing other Ground in lieu of suppressed Burial-Ground, or otherwise.*

Parish Council
to provide
ground.

105. When any burial-ground is closed under an Order in Council the Parish Council is forthwith to provide suitable burial-ground for the parish. If this be not done within six months after such order or requisition (*d*), then such Council, or any ten or more persons assessed for poor's rates in the parish, or two or more members of the Parish Council, may apply on the subject by summary petition to the Sheriff, who shall, after inquiry into the matter, designate a portion of suitable lands in the parish, not being part of a policy, pleasure-ground, or garden attached to a dwelling-house; or, if the lands be within 100 yards of any dwelling-house, without consent in writing of the owner. Intimation of at least ten days must be made to the owner of the lands before the designation is made, and there is an appeal to any of the Lords Ordinary (whose judgment is final) within fourteen days from the Sheriff's judgment (*e*).

Petition to
Sheriff.

Appeal.

(*a*) 18 and 19 Vict. c. 68, s. 7.

(*b*) *Ibid.* s. 8.

(*c*) *Ibid.* s. 4.

(*d*) The requisition referred to seems to be that mentioned in s. 9, viz., a requisition in writing of ten or more persons assessed for relief of the poor, or of any two or more members of the

Parish Council, but the reference is obscure.

(*e*) 18 and 19 Vict. c. 68, s. 10. See *Fulton v. Dunlop*, 1862, 24 D. 1027, and *Campbell v. Dunlop*, 1864, 2 M'P. 503. The appeal is not limited to questions with the owner of the ground.

106. Burial-ground may be provided from lands within or without the parish; but, save with the written consent of the owner, lessee, and occupier, no ground not used as or appropriated for a cemetery can be provided nearer than 100 yards from a dwelling-house (*a*). This rule does not apply to the provision of a private place of burial (*b*). CHAP. VI.
Locus of
new ground.

107. When any burial-ground is closed under the Act, and new burial-ground provided in lieu of it, all the existing burdens and liabilities attached to the ground so closed are transferred to the new burial-ground, the revenues of which are made liable for these burdens (*c*). Burdens
attached
thereto.

108. Although a burial-ground be not closed under the Act, the inspector of the poor in an extra-burghal parish, and the town-clerk in a burghal parish, must, on the requisition already specified (*d*), convene a special meeting of the Council to determine whether a burial-ground shall be provided. If a majority of the meeting resolve in the affirmative, such new burial-ground is to be provided in the same way as if an old burial-ground had been closed by an Order in Council (*e*). By the case of *Largs* (*f*), it has been ruled that a petition to the Sheriff under sections 9 and 10 of the Act, craving him to designate a suitable portion of burial-ground within the parish in respect of the alleged failure of the parish council to do so within the statutory period, is *ex facie* competent, although it be alleged in answer that a new burial-ground has *de facto* been provided. The judgment here pronounced recognises the jurisdiction of the Sheriff-Substitute, where the petition is *ex facie* competent, to inquire into the facts upon which its competency depends, and to dispose of the objection thereto. New ground
though old
not closed.

Case of Largs.

Sheriff-
Substitute's
jurisdiction.

(*a*) 18 and 19 Vict. c. 68, s. 11.

(*b*) *Bain v. Seafeld*, 1884, 12 R. 62.

(*c*) *Ibid.* s. 16.

(*d*) See *ante*, p. 222.

(*e*) *Ibid.* s. 9.

(*f*) *Fulton v. Dunlop*, 1862, 24 D. 1027.

CHAP. VI.

SECTION XXVI.—*Rights in and administration of
Burial-Ground acquired under the Act.*

Acquisition of
ground or
rights of
interment.

109. Parish Councils may contract for the purchase of any lands with the buildings thereon for burial-ground or addition to burial-ground under the Act; or may purchase a cemetery, or part thereof, subject to the existing rights of sepulture therein; or contract with cemetery companies for the interment, in ground belonging to them, of those having rights of interment in the burial-ground of such parish (*a*).

Joint burial-
grounds.

110. The Parish Councils of two or more parishes which have resolved to provide burial-grounds under the Act may concur in providing a joint burial-ground, and may agree as to the proportion of the expenses therefor to be borne by them respectively. In providing and managing such burial-ground, and in taking and holding ground therefor, the different Parish Councils shall, consistently with the terms agreed upon by them, act as a joint council (*b*).

Lands Clauses
Act.

111. Certain of the provisions of the Lands Clauses Consolidation (Scotland) Act, 1845, are incorporated with the Burial-Grounds Act, under, *inter alia*, this condition, that the provisions of the former statute “with respect to the purchase “and taking of lands otherwise than by agreement,” shall have effect only in respect of such lands as the Sheriff of the county shall have designated as fitting for a burial-ground in manner foresaid (*c*).

Rights in
burial-ground.

112. After burial-ground has been provided under the Act the same shall, from the time to be appointed by the Sheriff, be deemed the burial-ground, or part of the burial-ground, of the parish or parishes; and the parishioners and inhabitants thereof shall have the same rights of sepulture in such burial-ground as they respectively would have had in

(*a*) 18 and 19 Vict. c. 68, s. 12.

(*b*) *Ibid.* s. 14.

(*c*) *Ibid.* ss. 10 and 13.

the burial-ground in and for their respective parishes, subject to the provisions contained in the Act (*a*). CHAP. VI.

113. The general management of burial-grounds so provided is—subject to the provisions of and regulations to be made under the Act—vested in the Parish Councils (*b*), who may enclose and lay out the burial-grounds provided by them in such way as may be proper (*c*). Management
in Parish
Councils.

114. Parish Councils may sell in perpetuity, or for a limited period, a right of burial in any part of a burial-ground provided under the Act, which, with the sanction of the Sheriff, may be appropriated to this purpose, as well as the right of constructing a chapel, vault, or place of burial, with the exclusive right of burial therein in perpetuity, or for a limited period, and also the right of erecting monuments and gravestones (*d*). This section does not seem to confer a power to sell the *solum* of the grave, but merely a right of burial in perpetuity. It is not said to whom such sales may be made—whether to parishioners alone, or to persons also who are not parishioners. Read by itself the clause might rather import the latter alternative. But this construction of it is not easily reconcilable with the provisions contained in section 15, which seem to involve the result that the burial-ground under the Act is provided for the burial accommodation of the parishioners exclusively, just as parish churchyards are. Powers of
sale, &c.

Import of
power.

115. Parish Councils may hire, lease, or otherwise provide fit places for the reception of dead bodies previous to interment (*e*); and, subject to the approval of the Sheriff, may fix, revise, and alter tables of fees and payments in respect of interment, which shall be printed and published, and always affixed in some conspicuous part of the burial-ground (*f*). Reception of
dead.

Fees

116. Regulations as to burial-grounds under this Act, and places for the reception of the dead prior to interment, may be made by the Secretary for Scotland for the protection of Regulations
by Secretary
for Scotland.

(*a*) 18 and 19 Vict. c. 68, s. 15.

(*b*) *Ibid.* s. 17.

(*c*) *Ibid.* s. 23, as amended by 49 and 50 Vict. c. 21, s. 1.

(*d*) *Ibid.* s. 18.

(*e*) *Ibid.* s. 20.

(*f*) *Ibid.* s. 24.

CHAP. VI.

public health and the maintenance of public decency, to which Parish Councils and others must conform (*a*).

Assessments.

117. To defray the expenses incurred by a Parish Council in carrying out the Act, so far as not met by the fees paid under its provisions, an assessment may be levied in the same way as that in force at the time for the relief of the poor (*b*); and Parish Councils may also borrow money for providing and laying out burial-grounds, and charge the future assessments with the repayment of the principal and interest of the borrowed money, provided that, besides interest, there shall be paid in each year not less than one-twentieth of the principal till the whole is discharged (*c*).

20 and 21 Vict.
c. 42.

118. By the 20 and 21 Vict. c. 42, the 28th section of the "Burial-Grounds (Scotland) Act, 1855," which refers to the loan of money to Parish Councils under the powers conferred by 14 and 15 Vict. c. 23, is repealed, and in lieu thereof it is provided that the Commissioners under that Act, (*d*) and the several Acts therein mentioned, and relative thereto, subsequently passed, may make loans to Parish Councils for the purposes of the said Burial-Grounds (Scotland) Act, 1855, upon the security of the assessments authorised by that statute to be levied.

Loans.

Minutes and books.

119. Parish Councils are, through their officers, appointed to keep regular minutes of their proceedings, and books in which accounts of moneys received and paid by them shall be correctly entered; and these books shall be open to every member of the Parish Council and to ratepayers without a fee, who may also take extracts therefrom (*e*). Parish Councils may appoint and remove clerks, and such other officers as may be necessary for conducting their business as a burial board; may appoint reasonable salaries or allowances for them; and, when requisite, hire a sufficient office (*f*).

Clerks and officers.

(*a*) 18 and 19 Vict. c. 68, s. 21.

(*b*) *Ibid.* s. 26.

(*c*) *Ibid.* s. 27.

(*d*) Now the Public Works Loan Commissioners,—see 38 and 39 Vict.

c. 89, whereby s. 57 of 14 and 15 Vict. c. 23, is repealed.

(*e*) 18 and 19 Vict. c. 68, s. 29.

(*f*) *Ibid.* s. 30.

120. A register book must be kept by an officer appointed by the Parish Council, in which shall be recorded the burials which take place in the ground, and the particular localities in which the bodies are interred. In the case of burial-ground provided for more than one parish, the register book must be kept in such a way as to facilitate searches for entries therein "in respect of bodies from the several parishes." Copies or extracts therefrom shall be received in all courts as evidence of the burials entered therein (*a*).

CHAP. VI.

Register of
burials.Extracts to
be evidence.

(*a*) 18 and 19 Vict. c. 68, s. 31.

CHAPTER VII.

OF CHURCH BENEFICES.

PART I.—OF BENEFICES GENERALLY.

CHAP. VII.

SECTION I.—*Temporality and Spirituality of Benefices.*

Original
meaning of
the terms.

1. The property belonging to churchmen came, about the twelfth century, to be styled their “benefices”—a term which, originally used to signify grants of lands to a vassal for military service, was ultimately applied by the canonists to Church livings (*a*). As originally employed, this term included, on the one hand, lands and heritages, superiorities and rights of patronage; and, on the other hand, teinds, manses, glebes, and churches. The former class of subjects appears to have been denominated the temporality, and the latter the spirituality of benefices (*b*).

Their present
signification.

2. These terms are still employed, but with a somewhat different signification. By the temporality of benefices, as now understood, is meant the manse, glebe, and minister’s grass attached to the cure. By the spirituality of the benefice is meant the stipend due to the incumbent. These several provisions constitute the entirety of the endowment, which at the present day appertains to the parish clergyman (*c*). Without anticipating what is contained in the four succeeding chapters, it is proposed now to direct and confine attention to an explanation of the leading principles or doctrines which

(*a*) Craig, Jus Feudale, 1 dieg. 14, §§ 1, 2; Ersk. ii. 10, 4.

(*b*) See Hope’s Minor Pract. tit. ii. § 16, p. 101; Forbes on Tithes, p. 2. The Act 1587, c. 29, also corroborates this view. It purports to annex the

temporalities of benefices to the Crown. As not falling within this category, it excepts from its operation, *inter alia*, teinds, manses, and glebes. Connell, Tithes, vol. i. p. 102. (*c*) Bank. ii. 8, 127.

are common to the subjects embraced within this category, and which still regulate the rights of the incumbent, and the obligations of the heritors and others in connection therewith.

SECTION II.—*Dilapidation and disposal of Benefices prior to the abolition of Episcopacy.*

3. By the Act 1581, c. 101, no person in the function of the ministry provided to a benefice under Prelacy was allowed to dispoⁿse pensions, or make other disposition of the rents of his benefice in prejudice of his successors, or in diminution of the rental as at the date of his entry, under the penalty of deprivation and nullity of the right (*a*). By the Act 1585, c. 11, it was declared (1) that all persons thereafter provided to benefices to which the Crown had the right of presentation were to find security that they should leave the benefice at their decease or demission undiminished, and (2) that all tacks, feus, pensions payable in kind or converted into money, or other dispositions granted by such persons to the detriment of the benefice, should be of no avail (*b*).

Dilapidation prohibited by 1581, c. 101, and 1585, c. 11.

4. All alienations of church lands or property without the consent of the patron were contrary to the Canon law, as being an inversion of the purpose for which the grant thereof to the incumbent or beneficiary had been made by the patron (*c*). Voluntary onerous alienations of land belonging to a bishopric, when otherwise competent, could only be effectually granted with the bishop's consent. Hence, a feu granted by the vicar-general (the see being at the time vacant) and a majority of the chapter was reduced, although the

Alienations without consent of patron incompetent.

(*a*) On the import of the Act see *Freeland v. Murray*, 1631, M. 10,064; and *Winton v. Archbishop of St. Andrews*, 1679, M. 15,733. In reference to this statute, Mackenzie, Obs. p. 218, remarks that to elude its provisions beneficed persons used not to give down any of the bolls payable to the benefice, but to convert these bolls into money, and make those liable in payment liable in very small prices. As an example of this, see

Bishop of Edinburgh v. Brown, 1636, M. 2719.

(*b*) Mackenzie further observes on the Act 1585, c. 11, that although it only discharged the dilapidation of benefices of which the Crown is patron, "yet, *de praxi*, no benefices, even at the presentation of laick patrons, or ecclesiastical subjects, can be dilapidated."

(*c*) See *Ersk. ii. 10. 7*; and *King v. Laird of Kynneir*, 1569, M. 7938.

CHAP. VII.

disponee's infeftment was, *sed pendente lite*, confirmed by the Queen (*a*). A doctrine to a similar effect was applied to a wadset of lands belonging to a chanonry, or cathedral church (*b*).

What tacks
deemed
alienations.

5. A tack, whether by the dignified or the inferior clergy, of any church rents or property for the lifetime of the lessee was deemed an alienation, and therefore subject to reduction by the granter's successor, unless duly confirmed by the King or the Pope (*c*). Neither a parson nor a vicar could grant a feu or long tack of his manse or glebe, or of the kirk lands pertaining to the benefice, without consent of the patron, even although, where the lands were annexed to a cathedral church, the consent of the chapter had been obtained (*d*). Tacks for nineteen years, granted by prelates, were not reckoned alienations, and such tacks were binding on their successors, provided (1) that the rental of the benefice was not diminished (although *de facto* less than its true value) (*e*); and (2) that the consent of the chapter was obtained to the transaction (*f*)—the consent of the corporate body being deemed essential to validate a lease of such duration.

Tacks
competent to
prelates,

6. Prelates, however, might grant tacks for the period of five years without the consent of their chapter or convent, which were effectual and binding on their successors (*g*). In the case of Muckarsie, it was found that a parson could grant a valid lease of his benefice, other than his manse, for five years, which his successor was bound to warrant (*h*). On the

Parsons

(*a*) *Erskine v. Pitcairn*, 1566, M. 7962; see also *Officers of State v. Stewart*, 1858, 20 D. 1331.

(*b*) *N. v. Pitcarne*, 1566, M. 7963.
(*c*) See *Bishop of Aberdeen v. Forbes*, 1501, M. 7933; and *Abbot of Crosraguel v. Hamilton*, 1504, *ibid.* See *Stair*, ii. 3, 37; and the *Act* 1584, c. 7.

(*d*) *Douglas v. Tenants of Douglas*, 1567, M. 7963.

(*e*) Thus, in the *Provost of Queen's College v. Laird of Buccleuch*, 1542,

it was found that a tack of teinds, although set at less than one-half of the true value of the subject, was not liable to reduction, because the former rent was not diminished.—See *Balf. Pract.* p. 173, c. 11.

(*f*) *Provost of Queen's College v. Laird of Buccleuch*, 1542, M. 7934.

(*g*) *Bishop of Aberdeen v. Executors of late Bishop*, 1541, M. 7934.

(*h*) *Parson of Muckarsie v. Abercromby*, 1558, M. 7935.

other hand, a vicar could grant a valid lease of his benefice only for a period of three years (*a*). In the case cited, where the vicar had set a tack in periods of three years for the space of nine years, the lease was reduced *quoad* that period of its endurance, viz. six years, which was unexpired at the lessee's death. In a later case (*b*) a tack set by the possessor of the benefice in periods of three years, "ay and " while the space of nineteen years be run forth," was effectual to the lessee for three years from the death of the granter, he being then in possession of the benefice. In the case of Gaston (*c*), where the vicar's predecessor had set a tack to the defender in periods of three years during the lifetime of the lessee, it was found that he was entitled to retain possession of the subject set for the remainder of the period of three years of the lease entered upon and unexpired at the lessor's death. Tacks to endure during the incumbency of the setter, though with diminution of rental, were effectual as in a question with him, even although granted without such consent as was requisite to validate the right against his successor in the benefice. To this effect is the case of Bowton (*d*), where it was found that the doctrine in question applied to a lease granted by either a parson or a vicar.

CHAP. VII.
Vicars.

Tacks
effectual
against the
granters.

7. By the subsequent Act, 1594, c. 203, it was declared that no beneficed man under a prelate might thereafter set tacks of his teinds, or other parts of the benefice, to endure beyond three years, without consent of the patron. This, apparently, was a limitation of the right hitherto possessed by this class of incumbents, who, as the cases already cited seem to indicate, were entitled at common law to grant tacks of their benefices of five years' duration without consent of the patron. On the principle that a provost was not a prelate, the Court reduced a tack set by the provost of Lin-

Act 1594, c.
203.

(*a*) Parishioners of L. v. Ker, 1569, M. 7937.

(*b*) A. v. B., 1579, M. 7938.

(*c*) Vicar of Gaston v. Valentine, 1584, M. 7939.

(*d*) Vicar of Bowton v. Cockburn 1566, M. 7935.

CHAP. VII.

cluden because it wanted the consent of the patron, as required by the Act (*a*).

Act 1606, c. 3.

8. By the Act 1606, c. 3, it was, *inter alia*, declared that no one provided to a bishopric should dispone or give in pension any part of the patrimony of the benefice for a longer period than the disposer's right thereto; and further, that no bishop might set in feu or tack, or dispone, any part of the patrimony of the bishopric without consent of the chapter, or the majority of its members. On a construction of this latter provision the Court reduced a tack of teinds granted by the provost of Lincluden, as setter, with consent of the half of the chapter, on the ground that *he* could not be taken into computation, and, therefore, that the deed was not subscribed by the most part of the chapter (*b*). In another case the Court reduced certain tacks of lands belonging to a deanery annexed to the College of Aberdeen, because wanting the consent of the chapter (*c*).

Act 1617, c. 4.

9. By the Act 1617, c. 4, it was declared that no prelate should thereafter set in tack any part of his patrimony for a longer period than nineteen years, and no inferior beneficed person should do so for a longer period than his own lifetime, and five years after his death, under the pain of deprivation and infamy (*d*). In the case of Craighall (*e*) it was held that the statute did not render null tacks exceeding in duration the periods mentioned, but merely adjected a penalty against the granters thereof.

Act 1617, c. 5.

10. The Act 1617, c. 5, declared that it should be unlawful for any prelate to alienate or set for a longer period than his own lifetime any of the casualties of his benefice, but without prejudice of tacks before the Act, if granted in terms

(*a*) *L. of Drumlanrig v. Lord of Conhill*, 1616, M. 7941.

(*b*) *Maxwell v. Drumlanrig*, 1622, M. 7941.

(*c*) *College of Aberdeen v. Menzies*, 1629, M. 7945.

(*d*) From the operation of these provisions were expressly excepted,

by the Act 1617, c. 3, the tacks granted by the decree of the Commissioners of Teinds, under this statute, in recompense for the burden of ministers' stipend imposed on the tacksmen.

(*e*) *Hope v. Minister of Craighall*, 1624, M. 7943.

of law. On the narrative that, under pretence of the above Act 1617, c. 4, beneficed incumbents under the degree of prelates had, contrary to the intention of this statute, granted leases of the duration therein mentioned without the consent required by law, the Act 1621, c. 15, declared that all tacks set by such incumbents, *i.e.* incumbents under the degree of prelates, since 8th June 1594—being the date of the Act 1594, c. 203, already mentioned—for a longer period than three years, without consent of their patrons, were null.

CHAP. VII.

Act 1621, c. 15.

SECTION III.—*Confirmation by the Crown of Grants of Kirk Lands.*

11. On the recital that Her Majesty had been earnestly solicited to grant confirmations of the feus of Kirk lands set by prelates since 8th March 1558, and also before that date, the Act 1564, c. 88, ordained that all confirmations to be granted by Her Majesty of such rights should be as valid as if obtained from the Pope or See of Rome; and further declared, that infeftments of Kirk lands obtained by any one since the said date, not duly confirmed by Her Majesty, should be of no avail. On the narrative that all feus and long tacks of Kirk lands granted since 8th March 1558 should be confirmed by the King, and that various other such feus granted before this date should have been confirmed either by the King or the Pope, the Act 1584, c. 7, declared that all feus (*a*) of Kirk lands set before or after 8th March 1558 and unconfirmed should be confirmed by the King prior to 1st September 1585, and if unconfirmed should on this ground be liable to reduction.

Act 1564, c. 88.

Act 1584, c. 7.

12. The subsequent Act 1593, c. 186, repealed these provisions to this effect, viz. that dispositions of Church lands generally granted prior to 1584, being regular by the existing law, were declared effectual; leaving such only as were

Act 1593, c. 186.

(*a*) The Act does not, in its operative, as in its inductive part, mention long tacks.

CHAP. VII.

Act 1593, c.
190.

1584, c. 7,
confined to
Church lands.

Prescription
supersedes
confirmation.

granted after that date void, if not confirmed in terms of the Act 1584, c. 7. As several feus had been granted by prelates of their lands during the reign of James V., to which His Majesty had given his consent, the Act 1593, c. 190, declared that such rights, although not formally confirmed either by the King or the Pope, should be of full force, and be preferable to posterior grants of the same lands confirmed by the Crown in terms of the Act 1584, c. 7.

13. This statute is confined in its operation to the feus of Kirk lands; and accordingly, in the case of Coldingham (*a*), the Court found that gifts of an office of forestry granted by churchmen not falling within the category of Kirk lands needed not to be confirmed. Confirmation under the Act 1584, c. 7, was not necessary to render valid a grant of Church lands which was fortified by prescription. This point is well illustrated by the case cited (*b*). Here the disponee of Church lands formerly astricted to the mill of Dunfermline Abbey pleaded immunity from thirlage in virtue of a clause *cum multuris* in a charter granted in 1581 by the commendator of the monastery. This charter was not confirmed, and immunity from the servitude in respect of forty years' discontinuance could not be pleaded. In these circumstances it was held that while the grant *quoad* the lands had been validated by prescription, it was null *quoad* the immunity from thirlage.

SECTION IV.—*Effect of the suppression of Episcopacy.*

Prelacy
abolished in
1689.

14. The common law doctrines and statutory provisions above referred to, touching the power of disposal and administration of their benefices possessed by incumbents having right to cures under prelacies, including bishops, parsons, and vicars, naturally ceased practically to apply when such

(*a*) *Renton v. Feuars of Coldinghame*, 1666, M. 16,473 and 2840.—
See also Mack, Obs. p. 216.

(*b*) *Wedderburn v. Durie*, 1740, M. 7971.

incumbents ceased to exist. This they ultimately did on the final abolition of Episcopacy in 1689; but even during the period from the Reformation to that date the Episcopal order of the clergy was once and again temporarily suppressed, viz. from about 1592 to 1606, and from about 1637 to 1662. While the Reformation in Scotland was effected on a Presbyterian basis, a tendency long existed after this event to return to an Episcopal form of Church government. In point of fact, kirk-sessions, presbyteries, and synods co-existed with archbishops and bishops during certain and considerable periods after the Reformation, while the Episcopal order of churchmen, with their patrimonial rights, was recognised.

15. The authority of the Pope was formally abolished by an Act in 1560, which was ratified by that of 1567, c. 2. The Act 1572, c. 45, which was directed against suspected Papists, as well as the Acts 1578, c. 63; 1581, cc. 99, 100, 101, 102, and 106, all assume and recognise the existence of the Episcopal orders of the clergy. This remark applies also to the Act 1585, c. 11, which specially prohibits all persons to be provided hereafter to bishoprics, abbacies, priories, or other inferior benefices in the gift of the Crown, from dilapidating the same. By the Act 1592, c. 116, the jurisdiction hitherto possessed by bishops was recalled; and an Act passed in 1580, granting commission to them as judges in ecclesiastical causes, was repealed.

Episcopacy
recognised
under the Acts
mentioned.

Act 1592, c.
116.

16. The patrimony of bishops and chapters, which either as *bona vacantia* or by special annexation had vested in the Crown, was to a certain extent restored to them by the Acts 1606, c. 2, and 1617, c. 2. By the former statute the estate of bishops having benefices of cure, including their prerogatives, privileges, and property, were restored to them as the same existed prior to the Act 1587, c. 29. By the Act 1612, c. 1, the right of jurisdiction in matters of Church government and of presentation to benefices was specially re-conferred

Bishops'
patrimonies
restored.

CHAP. VII.

on them ; while the Act 1617, c. 2, provided for the restitution of chapters of cathedral churches, and the restoration to them of their benefices which had been annexed to the Crown.

Episcopacy
again sup-
pressed and
restored.

17. The order of bishops which, as the Act 1662, c. 1, narrates, was in the year 1637 overthrown, was by that Act again restored, with the dignities, jurisdictions, and rights of superiority and property as possessed by them prior to 1637 (*a*). This ecclesiastical order is recognised, and obedience to Episcopal authority was enforced, by the subsequent Act 1663, c. 2 ; and for upwards of twenty-five years Prelacy continued to exist, until by the Act 1689, c. 3, it was abolished, and Presbyterianism was finally established by 1690, c. 5, as the sole form of Church government recognised by law.

Episcopacy
finally
abolished.

Prelatic bene-
fices passed to
the Crown.

18. On the final abolition of Episcopacy the patrimonies which had pertained to the dignified and inferior clergy under Prelacy—save in so far as otherwise applied—reverted to the Crown. Thus the various statutory provisions applicable to the powers of disposal and administration by Episcopal incumbents generally of their patrimonies and benefices became inoperative, as neither such incumbents nor such ecclesiastical property any longer existed, at least in the eye of the law. The only incumbents whom law now recognised were parish ministers, and their benefices consisted exclusively of stipend, manse, and glebe, including minister's grass

Parish
ministers now
stipendiaries.

19. It appears in the next chapter that the parish ministers, whose stipends were payable at first out of "thirds" of teinds, and thereafter out of the whole teind, under the Act 1617, c. 3, and subsequent statutes, were stipendiaries, and that by the Acts 1690, c. 23, and 1693, c. 25, the order of "parsons" was practically abolished. Incumbents have not now, as they formerly had, a direct right to the teinds of their respective parishes. These teinds are merely burdened with a provision in their favour in the shape of stipend ; and from

(*a*) See *passim*, Kennedy *v.* Bishop of Orkney, 1668, 1 Br. Supp. 569.

the manner in which that provision is modified or made payable, its alienation by one incumbent to the prejudice of his successor is practically impossible. Hence, of the various statutes above alluded to, the one which appears most directly referable to existing parochial incumbents is that of 1572, c. 48, which, dealing with the temporality of benefices merely, viz., manses and glebes, contains the following clause: "Quhilkes manses and acres of land sa marked, and designed, " as said is, it sall not be leasum to the ministers or readers " present, or to cum, to sell, annalie, set in few, or takkes, " or to put ony in possession of the samin, in prejudice of " their successours; bot the samin to remaine alwayes free to " the use and easement of sik as sall be admitted to serve, " and minister at the said kirk."

SECTION V.—*Extent of the Temporality of the Benefice, and Incumbent's interest therein.*

20. The temporality of the benefice consists of—(1) a dwelling-house for the incumbent and his family, with suitable offices and a portion of garden ground, which together are known as the manse; (2) four acres of arable ground, or, in default of arable ground, a portion of grass land extending to sixteen sowms, known as the glebe proper; and (3) when there are Church lands in the parish, grass sufficient to pasture one horse and two cows, or otherwise, and in lieu of such grass an annual allowance of £20 Scots. As this benefice is provided and attached to the cure for the permanent accommodation and support of the successive parochial incumbents to be appointed thereto, so the right which each successive incumbent has in the benefice is limited to such a use and occupation of the subject as is consistent with this prospective use of it.

Of what temporality of benefice consists.

Incumbent's right therein.

21. In the first place, the incumbent is not the unqualified owner of the temporality of the benefice. He cannot sell or dispose of it at pleasure. Not only is he prohibited from so

Incumbent not owner.

CHAP. VII.

Case of Little Dunkeld.

Case of Cargill.

Doctrine not altered by 29 and 30 Vict. c. 71.

doing by force of the provisions of the Act 1572, c. 48 (*a*), but his common law right in the subject is not such as would—apart from statutory declaration on the subject—enable him to exercise the powers of a fee-simple proprietor. Thus in the case of Little Dunkeld (*b*) it was especially found that “a minister has not power to feu out his glebe, though he “may have a feu-duty in his offer greatly superior to what “can be drawn from the glebe as a farm.” In this case, as well as in the cases of Maderty (*c*) and of West Calder (*d*), judicial opinions were expressed to the effect that the incumbent was not the proprietor of his benefice (*e*). On this principle the case of Cargill (*f*) was decided. Here the Court held that under the Act 1663, c. 16, which ordains the assessment for the maintenance of the poor to be paid one-half by the heritors of the parish, and “the other half “thereof to be laid upon the tenants and possessors, according to their means and substance,” the minister, *qua* incumbent, was exempt, in respect that he was neither a heritor, a tenant, nor a possessor of the benefice.

22. While—contrary to the law as formerly existing—an incumbent may now, under the recent Act 29 and 30 Vict. c. 71, with the consent of the Presbytery and the heritors of the parish, feu or let on long leases a part of the temporality of the benefice, viz. the glebe, he is not thereby, even *quoad* this portion of the benefice, constituted absolute proprietor. The unfeued portion of the glebe, as well as the income derived from that part that is feued or leased, still belong to

(*a*) See Ersk. ii. 10, 61.

(*b*) Minister *v.* Heritors of Little Dunkeld, 1791, M. 5153, and Bell's Svo Cases, 235, where Lord Eskgrove observes, p. 242,—“I incline to think “that incumbents are not proprietors, “and that none but proprietors can “grant a feu.”

(*c*) Minister *v.* Heritors of Maderty, 1794, Bell's Fol. Cases, 76. Here Lord Craig says,—“In law the minister has no title to marl, for he has “no right of property in the glebe.”

In the pleadings for the minister in this case he distinctly disclaimed any right of property in the glebe.—See Session papers, 75 Campbell's Coll. No. 2, p. 11.

(*d*) In Learmonth *v.* Paterson, 1858, 20 D. at p. 420, Lord Ordinary Mackenzie distinctly lays down the doctrine that “a minister is not proprietor of the glebe.”

(*e*) See also Ersk. iii. 7, 32.

(*f*) Heritors of Cargill *v.* Tasker, 29th Feb. 1816, F.C.

the cure for the use of succeeding incumbents; while *quoad* the manse, the rights of each incumbent remain as they formerly were.

23. The incumbent is not the absolute proprietor of the benefice, his right in the subject is merely temporary (*a*), and, in some respects at least, not so extensive as that of a liferenter. The possession by the minister of the temporality of his benefice is dependent on the existence of his incumbency, the continuance of which may be terminated not only by his death, but by his resignation, deposition, or translation, to another living. Not merely can the minister's interest in the benefice not subsist beyond his own life, but further, it may be terminated at any moment during his life. Hence the right to or in connection with the benefice which he can transfer to another is even more precarious and defeasible in its character than the right which may be communicated or assigned by the liferenter of a heritable subject. The incumbent's right in his benefice has been recognised and dealt with as inferior to that possessed by a liferenter. Thus, while the tenant of a deceased liferenter requires formal warning before being removed, the tenant of a deceased minister may be summarily removed by the succeeding incumbent without warning, and on reasonable notice merely (*b*). In the early case of *Blebo* the Court found that a bishop was not *dominus* of the benefice who may dispose thereof save in so far as restrained by law, but merely *aeconomus, dispensator, curator, et administrator beneficii*, who could not dispose of the subject save in so far as permitted by law. The parish minister stands in very much the same position at the present day. In reference to his benefice he unites in his person the characters of a usufructuary and *curator beneficii*, and as such possesses the subject. In the former character he enjoys the use of it

(*a*) "Churchmen have no more " stipends or benefices."—Ersk. iii.
 ' than a temporary interest in their 7, 32.

(*b*) See CHAPTER X.

CHAP. VII.

himself. In the latter character he is bound to preserve, and to a certain extent to protect, its use for his successors in the cure.

SECTION VI.—*Incumbent's Duty to protect the Benefice.*

Incumbent
may not at
once cede
possession.

24. It has been already remarked that, *quoad* his successors in the benefice, the incumbent holds to a certain effect the character of curator or guardian of the subject. Accordingly, after he has been put in possession of certain subjects, as forming part of the benefice, he is not at liberty at once and without judicial warrant to cede possession thereof to a third party claiming them as his property, however plausible his claim may appear. If the incumbent be not inclined himself to take steps for the purpose of having the question of right formally disposed of, he should at least intimate the claim made either to the Presbytery or to the heritors, with the view of affording them an opportunity of disproving it by showing that the subjects do form part of the benefice. The propriety of the incumbent adopting some such course arises from the character of *curator et administrator beneficii* which belongs to him. As such it is his duty to maintain the entirety of the benefice, and adopt all prudent means to protect it against unwarrantable encroachment. It may further be observed, that the heritors in particular are entitled to have an opportunity afforded them of resisting any alleged claim, acquiescence in, or the success of which might involve them in liability to provide an addition to the benefice. These remarks are supported by the case of Walls and Flotta (a).

Form of action
to try claim.

25. A declaratory action, and not a suspension, seems to be the proper form of process in which to determine questions involving the permanent rights or interests of

(a) *Officers of State v. Bremner*, 1826, 4 S. 832; and *Bremner v. Officers of State*, 1831, 9 S. 838.

the benefice (*a*); and in order that the judgment pronounced may be *res judicata* in a question with subsequent incumbents, it would seem that when the action is directed against the minister the Presbytery should be also called as defenders, and the process duly intimated to the body of heritors, if they are not already parties to the process (*b*). When a minister raises an action with the view of vindicating his right to ground as glebe, and so part of the benefice, he must call all the heritors (*c*). A *dictum* by one of the Judges in the case of Corstorphine seems to imply that it is *ultra vires* of the Presbytery to alienate ground which forms part of the benefice, although such a grant, if completed by infestment and followed by forty years' possession, might constitute a valid title of ownership adversely to the incumbent (*d*).

SECTION VII.—*Nature of the Incumbent's Right to the Benefice.*

26. As is elsewhere explained (*e*), a minister's right to stipend and to an augmentation of it (when such a right pertains to him) is in its nature paramount and indefeasible. He cannot be deprived, nor can he dispossess himself of it, neither can he do anything to defeat the exercise of this right on the part of a succeeding incumbent. A minister's right, *quoad* the temporality of the benefice, is of a similar nature. It is created by statute in his favour, and attaches to him by virtue of his character as incumbent. Except by doing something which amounts to a personal bar, he cannot be excluded from claiming possession of what falls within the temporality of the benefice; neither can he

(*a*) See cases last cited; also per Lord President Boyle in *Magistrates of Elgin v. Gatherer*, 1841, 4 D. at p. 31.

(*b*) See per Lord Fullerton in case last cited, 4 D. at p. 33.

(*c*) *Lockerby v. Stirling*, 1835, 13 S. 978.

(*d*) Per Lord Justice-Clerk Boyle in *Scot v. Ramsay*, 1827, 5 S. at p. 369. See also *Minister of Falkland v. Johnston*, 1793, M. 5155.

(*e*) See *post*, CHAPTER VIII.

CHAP. VII.

Case of
Falkland.

as a general rule, by an act on his part, exclude a succeeding incumbent from doing so.

27. In the case of Falkland (*a*), the then minister of the parish entered into an onerous contract with the titular in 1650, whereby, with the concurrence of the Presbytery, he gave up his manse and glebe in consideration of the annual payment of a chalder of bear out of the teinds. This arrangement was acted on for much more than forty years, and, in virtue of the positive prescription, the right of the person to whose author the glebe had been disposed was protected against challenge. Notwithstanding all this, however, it was held that a subsequent incumbent was not barred from demanding a manse and glebe, both of which the heritors were required to furnish of new.

Brechin.

28. In the case of Brechin (*b*), which was a burghal-landward parish with a collegiate charge, the minister of the first charge, who had no glebe, voluntarily surrendered his right to one in favour of his colleague, to whom a glebe was accordingly designated. Many years afterwards the incumbent of the first charge demanded that a glebe should be designated to him. In a suspension of the Presbytery's decree ordaining this to be done, which was followed by a declarator, the heritors pleaded the above arrangement as excluding the claim, and all liability on their part to implement it. The Court, however, repelled the plea, and found that neither the consent given by the former incumbent of the first charge, nor the subsequent possession by the incumbent of the second charge, of the glebe as designated, prevented the first minister from now insisting in his legal rights (*c*).

Inference from
these cases.

29. Having regard to the import of these cases, and the

(*a*) Minister of Falkland *v.* Johnston, 1793, M. 5155.

(*b*) Panmure *v.* Presbytery of Brechin, 1855, 18 D. 197.

(*c*) In this case Lord Colonsay (then Lord President) remarks, 18

D. at p. 201: "The Presbytery had
" no power at all to deprive the first
" minister of his rights, and as little
" do I think that the benefice could
" be prejudiced by the act of the
" incumbent for the time."

principles of law on the subject generally, it may perhaps be doubted whether a renunciation by an incumbent of a right in the benefice, even if effectual as in a question with him, can, without the concurrence of the Presbytery and heritors, be made, which is not liable to be set aside by the Presbytery, *qua* guardians of the rights of the benefice, even during the incumbency of the minister so renouncing. When the transaction entered into by him results in the acquisition by a third party of an unchallengeable right of property in what was formerly part of the temporality of the benefice, a succeeding incumbent will be entitled to demand a designation of new to the extent of his legal rights so far as these have by the transaction been impaired (*a*).

30. In some cases the enjoyment of part of the temporality of the benefice can be legally realised in an alternative, or rather a subsidiary form, *ex gr.* by an allowance of £20 Scots annually in lieu of minister's grass. When this is so, and the money provision has, at the desire or with the consent of the incumbent for the time, been assigned to him by the Presbytery, it rather appears from the case of Dollar (*b*) that where prescriptive possession has followed on such an arrangement it is unchallengeable by a subsequent incumbent.

Qualification of
the doctrine.

Case of Dollar.

31. In the prior case of Newburn (*c*), where the minister had accepted of the money allowance, which for upwards of eighty years the heritors continued to pay, the Court nevertheless held that this did not exclude a succeeding incumbent from demanding a grass glebe. In this instance, however, it appears that land liable to designation as such existed at the time and had been actually set aside by the Presbytery for this purpose, and the arrangement apparently was not agreed to by them. These circumstances probably

Newburn.

(*a*) See Minister of Falkland *v.* Johnston, *supra*, M. 5155.

(*b*) Minister of Dollar *v.* Duke of Argyle, 1807, M. *Glebe*, Appx. 7.

(*c*) Lawrie *v.* Halket, 1804, M. *Glebe*, Appx. 4.

CHAP. VII.

account for the opposite judgment pronounced in this case and in that of Dollar.

SECTION VIII.—*When the Incumbent's Right to the Benefice emerges and ceases.*

Induction.

32. The point of time at and from which the incumbent's right to the benefice emerges is that of his induction, as opposed to his presentation or election (*a*). While the doctrine as now stated may with perfect accuracy be predicated of all the provisions composing the benefice, yet in its practical application an important distinction is to be noted between the spirituality and the temporality of the benefice. As is elsewhere pointed out, the right to draw or receive payment of the stipend attached to the cure may not commence until, it may be, a considerable period after the minister's induction thereto—being dependent (1) on the relation in point of time between the date of that event and the occurrence of the terms of Whitsunday and Michaelmas; and (2) on the existence or absence of a claim to ann (*b*).

Stipend.

Rule in regard
to manse and
glebe.

33. The case is different as regards the temporality of the benefice. Unlike in this respect to stipend, which is of the nature of a recurring claim on a subject which only periodically exists, the manse and glebe are subjects which have a corporeal and permanent existence. Accordingly, the incumbent's right to the possession or occupancy of these subjects not only theoretically emerges, but practically commences on his induction. Immediately on this event he is entitled to the use and, save in exceptional cases, to enter upon the actual possession of the temporality of the benefice, manse as well as glebe, both of which in this respect are *in pari casu* (*c*).

(*a*) See *Minister v. Heritors of Kirriemuir*, 1715, M. 9949; *M'Callum v. Grant*, 1826, 4 S. 527; *Lockerby v. Stirling*, 1835, 13 S. 978. The presentee "can have no right to the "fruits of the benefice until he shall

"be inducted." Per Lord Corehouse in *Earl of Kinnoull v. Presbytery of Auchterarder*, 1838, 16 S. at p. 769.

(*b*) See CHAPTER VIII.

(*c*) Per Lord Robertson in *M'Callum v. Grant*, 1826, 4 S. 529, top.

34. In the vindication of this right the new incumbent may summarily remove therefrom all who are in the actual occupancy of the subject, whether in the character of representatives or tenants of his predecessor in the benefice. Hence in the case of Anstruther (*a*) the Court expressly found that the entrant minister might remove the occupant of the manse without warning. To the same effect substantially is the recent case of Barry (*b*), which also shows that a similar doctrine applies to the glebe. The incumbent acquires, immediately on his induction, right to its use or possession, and, as a general rule, is entitled without formal warning to remove any one in the occupancy thereof on reasonable notice given (*c*). This holds good as regards not only the defunct's relict or executors (*d*), but also a tenant or onerous assignee of the minister (*e*), because on his death such tenant or assignee possesses *sine titulo*, or rather in defiance of the legal right of the next incumbent (*f*). It is no sufficient answer by the tenant to such a demand to remove that the entrant incumbent does not intend to occupy the glebe personally (*g*).

Summary
removal.

35. The exceptional cases above alluded to, in which the general rule now stated does not apply in its entirety, are those in which a crop has been sown on the glebe lands by the minister, or by his tenant during the minister's incumbency, which is not reaped until after the lessor's incumbency has terminated. In such circumstances, as the grain when reaped belongs to the person who sowed it, or to his assignee, so the occupancy of the ground to the effect of securing the ingathering of the harvest is conceded to him to whom the produce of the harvest belongs (*h*).

Exception to
the rule.

(*a*) Couper *v.* Bruce, 1692, M. 13, 831.

(*b*) Simpson *v.* Somers, 1852, 14 D. 924.

(*c*) Hannay *v.* Rutherford, 1628, M. 14, 989.

(*d*) Scrimgeour *v.* Executors of Murray, 1664, M. 463. See finding applicable to *quest.* 3

(*e*) M'Callum *v.* Grant, *supra*.

(*f*) *Ibid.* per Lord Glenlee, 4 S. at p. 529, foot.

(*g*) *Ibid.*

(*h*) On this subject see *post*, CHAPTER X.

CHAP. VII.

When incumbent's right to benefice ceases.

36. The incumbent's right to or interest in the benefice comes to an end contemporaneously with the termination of his incumbency, which may be caused by his death, translation, resignation, or deposition. On the occurrence of any of these events the pastoral relationship hitherto subsisting between the incumbent and the cure is severed, and with it all his connection with the benefice thereto attached. The time at which a vacancy arises, on the occurrence of these events respectively, will be subsequently explained (*a*). A minister who maintains possession of the manse or glebe after a final sentence of deposition has been pronounced against him by the Church courts is deemed an intruder within the meaning of the Act 1594, c. 221, and as such liable to be summarily ejected (*b*).

SECTION IX.—*Plurality of Benefices inconsistent with our Law.*

Enactments on the subject.

37. The Act 1581, c. 100, provided that each parish should have its "awin pastour with a sufficient and reasonabil " stipend." The Act 1584, c. 132, enumerates, among various other crimes and vices with which "unworthie persones" were then chargeable, the offence of holding a plurality of benefices having cure, and declared that all "persones, " ministers, or readers " suspected thereof should, on conviction, be "deprived asweil fra their function in the ministrie " as from their benefices." This statute, however, provided that union of kirks to one benefice should not be judged plurality till further order be established in that behalf.

Doctrine stated.

38. Consistently with these enactments it has been remarked that there is no such thing known to the law of

(*a*) See *post*, CHAPTER VIII.

(*b*) *Simpson v. Somers*, 1852, 14 D. 924. Although, as appears from the terms of the Sheriff's judgment of ejection, it was rested on the technical ground that juratory cau-

tion was not sufficient, it is plain, from the remarks made by the Judges in the Court of Session, that they were all agreed that the petitioner was entitled to a decree of immediate ejection against the suspender.

Scotland as a plurality of benefices (*a*). This *dictum*, as the statute itself indicates, refers to a plurality of cures having benefices attached to each, and expresses the doctrine that it is inconsistent with the genius of our law for the same incumbent to hold more than one cure of souls with a benefice attached.

39. When separate parishes, each of which possessed a glebe, are united into one parish, their respective glebes form one *cumulo* benefice, and as such belong to the united parish, and are possessed by its successive incumbents (*b*). Unless when otherwise disposed of on the occasion of the parochial union (*c*) the different glebes are naturally attached to the new cure, and in this way it frequently happens that the temporality of the benefice of certain parishes is much in excess of the legal amount. Thus, in the cases of Inverkeithing (*d*) and of Little Dunkeld (*e*) the incumbents had two glebes. In the case of Borgue (*f*) the minister had three glebes, while in that of Blair-Athole (*g*) he seems to have had at one time four glebes.

40. In certain instances separate benefices may exist in connection with the same parish. This occurs where the church is a collegiate one. Here there is a double parochial charge, styled respectively the first and the second charge, which, although attached to the same cure, are presided over by separate incumbents. Each incumbent is entitled to a separate benefice (*h*), but these benefices frequently differ in

(*a*) Per Lord Ordinary Moncreiff in *Luke v. Brown*, 1832, 10 S. at pp. 310–11; and per Lord Probationer Marshall in *Campbell v. Campbell*, 1852, 15 D. at p. 9.

(*b*) See Bank. ii. 8, 46; Ersk. ii. 10, 61; Forbes, Tithes, p. 225; per Lord Balgray and Lord President Hope in *Stewart v. Glenlyon*, 1835, 13 S. at pp. 798 and 800.

(*c*) Special arrangements in regard to the appropriation of the existing glebes are frequently made, whereby the union of the parishes has not the effect of increasing much, if at all, the legal extent of this part of the

temporality of the benefice,—as in the cases of Kirkmichael in 1662; Kirknewton in 1750; Robertson in 1772; and Rothes in 1782. See Connell Par. pp. 58, 166, 180, and 190.

(*d*) *Rough v. Ker*, 1631, M. 5124.

(*e*) *Minister v. Heritors of Little Dunkeld*, 1791, M. 5153.

(*f*) *Forbes v. Miller*, 1755, M. 5127.

(*g*) *Stewart v. Glenlyon*, 1835, 13 S. 787.

(*h*) Per Lord Curriehill in *Panmure v. Presbytery of Brechin*, 1855, 18 D. 202.

CHAP. VII.

extent. Thus, while the minister of the first charge of a burghal-landward parish is entitled to a manse and glebe, the minister of the second charge is not entitled to either (a).

SECTION X.—*Liability of Benefice to Taxation.*

Construction
of Act 1593, c.
166.

41. By the Act 1593, c. 166, it is declared that "all ministers' stipends, in time cumming, be free from all tackes, pensiones, *taxationes*, or impositiones quhatsumever, notwithstanding of ony gift or disposition maid in the contrair," &c. Under the construction of this Act it was decided in 1819 that its terms were not such as to exempt parochial clergymen from payment of the assessed taxes, or of property tax on their manses and glebes, under the Acts 43 Geo. III. c. 122; 46 Geo. III. c. 65; and 48 Geo. III. c. 55 (b). In giving judgment Lord Redesdale laid it down that a similar rule applied to the stipends of the clergy, and this notwithstanding the terms of the Act 1593, c. 166. While expressing a doubt as to what kind of taxation was therein alluded to, his Lordship remarked that it must be held to "mean something of the same kind with those other things which are expressly and specifically prohibited," and did not include "personal impositions on the clergy." It has also been found that a parish minister is liable in payment of inhabited house duty in respect of his manse (c). In virtue of the provisions of the Income Tax Acts ministers are liable for income tax on the profits or gains arising or accruing to them from their stipends (d).

Inhabited
house duty.

Income tax.

42. Prior to the 8 and 9 Vict. c. 83, they were not liable to be assessed for poor-rates either in respect of their manses, glebes, or stipends. This exemption, as explained in the next

(a) See CHAPTERS IX. and X.

(b) *M'Lea v. Walker*, House of Lords, 1819, 1 Bligh, 535, not reported in Court of Session.

(c) See Assessed Tax Cases, Vol. 1839-59, No. 886, and also 847, where

liability for such assessment was assumed.

(d) See 31 and 32 Vict. c. 28, s. 3, under reference to 30 and 31 Vict. c. 23, and 16 and 17 Vict. c. 34.

paragraph, so far as concerns the temporality of their benefices, they still enjoy. But it is otherwise *quoad* assessment in respect of the spirituality of the benefice, liability for which has been imposed on incumbents by the 49th section of this statute, which enacts "that clergymen shall be liable "to be assessed for the poor in respect of their stipends" (*a*). By the term "clergymen" here used is meant parochial ministers, for to them alone is the provision applicable (*b*). In the case cited it was held that a parochial clergyman was under the statute cited liable to assessment for relief of the poor in respect of his stipend in the parish within which his cure lay, and not in the parish where he happened to reside. The stipend, however, is assessable as ordinary income only, and accordingly, where the whole assessment is laid upon rent and none upon means and substance, as is the universal practice, the stipend is not assessed.

CHAP. VII.
Minister
liable for
poor-rates in
respect of
stipend.

43. In the case of Cargill (*c*) it was held that a parish minister was not liable to be assessed for poor-rates under the Act 1663, c. 16, in respect of the temporality of the benefice, inasmuch as he was neither a heritor, a tenant, nor a possessor thereof. On a construction of the term "owners," in the Poor Law Act, 1845 (*d*), a similar exemption was held to apply to incumbents (*e*) in respect of the temporality of the benefice. This decision proceeds on the ground of their former non-liability, taken in connection with the terms of section 49 which, while omitting reference to manse and glebes, specially mentions stipends, and imposes liability for poor-rates in respect of stipends. The immunity extends to the minister of a parish *quoad sacra* in respect of assessments on a manse provided as part of his statutory endowment (*f*).

Poor-rates in
respect of
manse and
glebe.

44. The parish minister is liable for school rate in respect

(*a*) *Forbes v. Gibson*, 1850, 13 D. 341, affd. 1 Macq. 106.

(*b*) *Percuriam* in *Adams v. M'Leroy*, 1857, 14 D. at p. 251.

(*c*) *Heritors of Cargill v. Tasker*, 29th Feb. 1816, F.C.

(*d*) 8 and 9 Vict. c. 83.

(*e*) *Forbes v. Gibson*, 1850, 13 D. 341, affd. 1852, 1 Macq. 106.

(*f*) *Baillie v. Parochial Board of Sorn*, 1889, 27 S.L.R. 6.

CHAP. VII.

School rate
and special
rate.

of the annual value of his manse and glebe (*a*). In the case of Kelton (*b*) it was ruled that under a local road Act, which declared the terms "proprietor," "tenant," and "occupier" therein occurring to be construable as in the Valuation Statute, 17 and 18 Vict. c. 91, the minister was liable to assessment, *qua* "proprietor" of his manse and glebe, within the meaning of this expression as therein defined.

PART II.—ON THE POSSESSORY RIGHTS OF CHURCHMEN.

SECTION XI.—*Rule of decennalis et triennalis possessio by the Canon Law.*

Origin of
triennalis
possessio.

45. The doctrine of thirteen years' possession by churchmen of their benefices, as recognised by the law of Scotland, is traceable to the Canon law, the rules of which law on this subject it will be convenient, in the first instance, shortly to explain. Commentators on the Canon law attribute the origin of the rule of *triennalis possessio* to a decree of the Council of Basle, which decree was approved of and adopted by succeeding Popes with scarcely any variation, although without acknowledgment (*c*). Hence the origin of the rule is by some writers, and among others by Bankton (*d*), referred to the Roman Chancery. Its source, however, seems to have been that just mentioned; and Van Espen remarks (*e*) that the rule was received in France as a decree of the Council of Basle, introduced into the Pragmatic Sanction and confirmed by the Concordat between Pope Leo X. and Francis I. (*f*).

(*a*) Hogg *v.* Parochial Board of Auchtermuchty, 1880, 7 R. 986; Campbell *v.* Gillanders, 1884, 12 R. 309.

(*b*) Cowan *v.* Gordon, 1868, 6 M.P. 1018.

(*c*) For which he gives this reason—quia "Summi Pontifices autoritate 'illius uti noluerunt, ne sic tacite 'illud (Concilium Basileense), approbare viderentur." See Gomesius, Comment. in Judic. reg. Cancell. Ed. 1575, p. 316.

(*d*) Bank. ii. 8, 106, *et seq.*

(*e*) See Van Espen, Jus. Eccles. Univ. Pt. 2, sect. 3, tit. 9, cap. 4; and Gomesius, *ut supra*.

(*f*) To a similar effect is the history of the rule as given by Durand de Maillane in the "Dictionnaire de 'Droit Canonique," under the title *Possession Triennale*.

46. From the provisions of the decree (*a*), and the rule (*b*) founded thereon, it appears that their effect was to declare that those churchmen who had been in the peaceable and uninterrupted possession of a benefice for the space of three years continuously should not only be secure against molestation in the continued enjoyment thereof, but should also be regarded as the true and rightful possessors of the benefice, provided (1) that such persons had not by force or fraud entered into the benefice; and (2) that they had been inducted into the cure to which the benefice was attached in a lawful and regular manner; and, in particular, that they had not obtained the same by any simoniacal gift or preferment. When these conditions were realised the incumbent was held to possess the benefice on a presumably good, or, as it was technically termed, a *colourable* title, which, when combined with three years' *de facto* continued possession, secured to him the benefit of the rule. Hence the brocard—*triennalis pacificus possessor beneficii est inde securus*.

CHAP. VII

Object and effect of the rule.

Colourable title.

(*a*) The Decree, as inserted in the Pragmatic Sanction, and styled “de Pacificis Possessoribus,” is in these terms:—“Quicumque non violentus, sed habens coloratum titulum, pacificè et sine lite Prælaturam, Dignitatem, Beneficium, vel Officium triennio proximo hactenus possedit, vel in futurum possidebit, non possit postea in *petitorio* vel *possessorio* à quoquam etiam ratione juris noviter impetrati, molestari, excepto hostilitatis casu, vel alterius legitimi impedimenti, de quo protestari, et juxta concilium Viennense illud intimare teneatur. Lis autem hoc casu quoad futuras controversias intelligatur, si ad executionem citationis, jurisque sui in judicio exhibitionem, ac terminorum omnium observationem processum fuerit. Ordinarii autem diligenter inquireant, ne quis sine titulo Beneficium possideat. Quod si talem quandoque repperint, declarent jus illi non competere, vel huic (si sibi videtur) nisi sit intrusus, seu violentus, aut aliàs indignus, vel alteri idoneo provideant.”

(*b*) The rule derived from this Decree is thus expressed:—“Item statuit, et ordinavit idem D. N. quòd si quis quæcumque Beneficia Ecclesiastica, qualiacumque sint, absque simoniaco ingressu ex quovis titulo, Apostolicà vel ordinaria collatione aut electione, et electionis hujusmodi confirmatione, seu presentatione et institutione illorum, ad quos Beneficiorum hujusmodi collatio, Provisio, electio et presentatio, seu quævis alia dispositio pertinet, per triennium pacificè possederit (dummodò in Beneficiis hujusmodi, si dispositioni Apostolicæ ex reservatione generali in corpore Juris clausa, reservata fuerint, se non intruserint) super eisdem Beneficiis taliter possessis molestari nequeat; nec non impetrationes quaslibet de Beneficiis ipsis sic possessis factas, irritas, et inanes censeri debere decrevit, antiquas lites super illis motas penitus extinguendo.”

CHAP. VII.

Possession
must be
personal.

47. By the Canon law an incumbent could not found upon a three years' possession of a subject as part of the benefice by his predecessor in the benefice, nor could he impute any period of possession by such predecessor in order to make up the triennial period of possession pleadable by himself. "La possession doit de plus etre continuée en la même personne; car celle du prédécesseur ne sert de rien" (a)—one reason for this being that there is no hereditary succession in ecclesiastical benefices (b). Thus the rule under the Canon law was *personal* to the incumbent who invoked its aid.

Distinction
between
annalis, and
triennalis
possessio.

48. The *annalis possessio* sufficed to protect an incumbent against intrusion on the part of one who had no title, or no better title to the benefice or the subject than the possessor (c). The *triennalis possessio* went a step further and conferred a right of continued possession in favour of the incumbent occupant against all and sundry. Hence it has been styled "la prescription légitime en matière de bénéfices" (d). Yet, inasmuch as the benefit of such a title was personal to the incumbent who had possessed for the requisite period of three years, it was a prescriptive title of possession merely, not of property. As the rule was based on the presumption of a good title, it was displaced by contrary fact, and therefore, although the colourable title was good against a competing title, it did not protect where its own invalidity was established.

Rule of *trien.*
poss. how
qualified.

49. When a colourable title to the benefice on the part of the incumbent did not exist, the rule of the *triennalis possessio* did not apply. In this case, or where the incumbent, though possessing a colourable title to the benefice, *de facto* occupied as part of his benefice a subject, right to possess which he could not ascribe to any title, the Canon law held

'Ten years'
possession
equivalent to
a colourable
title.

(a) Fleury, Droit Ecclesiastique, vol. i. p. 462.

(b) Van Espen, *ut supra*.

(c) The distinction between the *triennalis* and the *annalis possessio* under the Canon law is thus pointed out in the Codex Fabrianus, i. 2, 15, "Quoniam hæc (*triennalis*) tribuit jus in

"Beneficio, illa (*annalis*) non item, sed excludit duntaxat impetrantem ob non expressas possessoris qualitates, neque tam in favorem possessoris inducta est, quam in odium male impetrantis."

(d) Fleury, *ut supra*.

ten years' peaceable and continuous possession of the benefice, or of a subject as part of the benefice, as equivalent to a colourable title. Hence the rule of the *decennalis possessio*.

50. A title being thus created *fictione juris*, three years' possession following immediately thereon put the incumbent in the position in which he would have been if he had enjoyed a triennial possession under a good or at least a colourable title, and enabled him to plead such possession with effect. Thus arose the rule of *decennalis et triennalis possessio*, in virtue of which an incumbent possessing a subject as his benefice for these two combined periods—though without a colourable title *de facto* as applicable to the three years' possession—acquired the benefit of such a title in respect of the ten immediately prior years' possession, and was thus secured in the continued enjoyment of the subject which had been so possessed by him for thirteen years continuously (*a*).

Rule of *decen.*
et trien. poss.

SECTION XII.—*Rule of decennalis et triennalis possessio by the Law of Scotland.*

51. While our law recognises the doctrine of *decen. et trien. poss.*, it is in its principles and application different in several essential respects from the rule of the Canon law. The rule of our law is, that thirteen years' uninterrupted peaceable possession by an incumbent of a subject, as being or forming part of his benefice, confers a presumptive right in his favour to its continued possession as such without a written title (*b*). According to Erskine the rule was introduced because the rights of churchmen are more exposed to accidents than

Doctrine
stated.

(*a*) The rule is thus stated in the Codex (Fabrianus, i. 2, 76 :—"Habens
"titulum non coloratum ab eo qui
"neque jus habuit neque in possessione fuit beneficii conferendi cum
"dicatur intrusus non juvatur regula
"de triennali. Nisi per pacificam
"possessionem decennalem assecutus
"sit ut existimari debeat habere titu-

"lum coloratum. A quo demum
"tempore præteriti decennii tempus
"triennii computabitur. Itaque continua et pacifica tredecim annorum
"possessio in eam rem requiretur."
(*b*) See Stair, ii. 1, 25; Bank. ii. 8,
106 *et seq.*; Ersk. Inst. iii. 7, 33,
34.

CHAP. VII.

those of other men through the frequent change of incumbents. The rule in Scotland is one of common law, and though it is no doubt traceable to the Canon law, it is not known how it came to be adopted in a form differing so much from the rule of the Canon law.

*Triennalis
possessio.*

*Decennalis
possessio.*

52. Our law does not, however, confer on the *triennalis possessor* with a colourable title the benefit of the rule of the triennial possession above explained, and although traces do exist in the books of the *decennalis possessio* (a), it does not seem to have ever been adopted by our law as an equivalent or substitute for a colourable title, but is probably the remnant of the "old custom" of the ten years' possession of Kirk lands prior to the Reformation, which was in 1618 superseded by the rule of the thirty years' possession then adopted (b). There was also a *decennalis possessio* recognised by the Act 1690, c. 23, to the effect that the superiorities of patronate benefices, of which ministers had been in possession as incumbents for the space of ten years, should not be redeemable by the sovereign. This provision, however, has nothing to do with the rule of the *decenn. et trienn. poss.*, which has been recognised by our law (c), and which is applicable both to the spirituality and the temporality of the benefice. The rule is thus expressed, "*decennalis et triennalis pacificus possessor non tenetur docere de titulo.*"

SECTION XIII.—*Thirteen years' possession presumes a Title to the Subject.*

Presumptive
title to
possession.

53. Thirteen years' possession does not confer by prescription a right of property in favour of the incumbent. It merely creates a title to continued possession as derived

(a) See *Ramsay v. Roxburgh*, 1610, M. 15,626; *Minister of Falkland v. Minister of Strathmiglo*, 1630, M. 10,638.

(b) *Earl of Home v. Duke of Buccleuch*, 1612, M. 7972, and 10,998.

(c) See per Lord Wood in *Cochrane v. Smith*, 1859, 22 D. at p. 254.

from the presumption that the subject forms part of or constitutes the benefice. On this principle a minister successfully pleaded the brocard in defence to an action of removing from twelve acres of land (other than his glebe of four acres designed) in respect that he was provided to the parsonage of the church, and that, *qua* incumbent, he had right to these twelve acres which were Kirk lands, and as such formed part of the benefice (*a*).

54. But the presumption that an incumbent possessing a subject for thirteen years has done so *qua* incumbent, and because it is part of the benefice, may be overcome by evidence which shows that the possession is attributable to a subordinate or different title (*b*). Thus, if a minister's occupancy of a piece of land be traceable to a title personal to him as a tenant or disponent, his occupancy of it, though beyond the period of thirteen years, will not imply that he is entitled to possess the ground *qua* glebe. In such a case, possession of the subject by him *qua* incumbent being excluded, he is debarred from pleading the brocard (*c*). In the case of Cupar (*d*) the minister's thirteen years' possession was viewed as attributable to a private personal right from the heritor. In the case of Tinwald (*e*) the proof indicated that the thirteen years' possession of the meadow-ground by the minister was attributable to a different title of possession than as incumbent—probably as lessee under the feudal proprietor of the ground. In both instances the Court negatived the pleas founded on the thirteen years' possession.

55. On a somewhat similar principle, if the ground, though possessed for the requisite period and claimed by the minister as part of his benefice, could not legally be

Presumption
may be
overcome.

Case of
Tinwald.

When subject
cannot form
the benefice.

(*a*) Maxwell v. Rodger, 1630, M. 10,638.

(*b*) See per Lord Wood in Cochrane v. Smith, 1859, 22 D. at p. 255.

(*c*) Grahame v. Ogilvie, 1682, M. 7955; Greig v. Duke of Queensberry, 21st Nov. 1809, F.C.

(*d*) Cochrane v. Smith, 1859, 22 D. 252.

(*e*) Greig v. Duke of Queensberry, *supra*.

CHAP. VII.

designed or cannot legally be treated as such, he will not be entitled to plead the brocard as against the rightful owner of the subject. Thus, in defence to an action of reduction by the owner of *temporal* lands of a designation out of them of the minister's glebe, in respect that there were Kirk lands in the parish which should have been designed *primo loco*, the minister pleaded thirteen years' possession of the glebe designed. This defence, however, was repelled to the effect of allowing the designation to be produced in order to have it ascertained out of what lands *de facto* the glebe was designed, and whether such designation was or was not in the circumstances erroneous (*a*).

Thirteen years' possession supersedes a title.

56. Under the terms of the brocard—*decennalis et triennalis possessor non tenetur docere de titulo*—thirteen years' possession by an incumbent is regarded as equivalent to a title. The result of this is that it relieves him from the necessity of producing a written title (*b*). Thirteen years' possession, however, only presumes a title in a churchman. It does not amount to proof of one, neither does it constitute one as by prescription. The possession may be otherwise accounted for (*c*). Although, therefore, the *tredecim possessor* is not bound to produce a written title, yet if such a title be produced it may be appealed to as showing the nature and limits of his rights (*d*).

Yet if title produced it may be appealed to.

Case of Glenmuick,

57. Thus, in the case of Glenmuick just cited, the Court held that although the incumbent and his successors had been upwards of thirteen years in possession of the teinds of the parish by tack or use of payment, the decret of locality produced, which was the minister's proper title to his teinds,

(*a*) Forret *v.* Matters, 1678, M. 5139. See Minister *v.* Heritors of Logie, 1686, M. 7957, which, however, is inconclusive.

(*b*) Minister *v.* Heritors of Skein, 1675, 1 Br. Supp. 731, 2 Br. Supp. 183; see also Bishop of Galloway *v.* Prebendaries of Chapel Royal, 1616, M. 15,627.

(*c*) Duke of Buccleuch *v.* Parish-

ioners of Hassenden, 1671, M. 12,401, and also 10,999, where this case is reported under the title Duke of Monmouth *v.* Parishioners of Hassenden.

(*d*) Leslie *v.* Minister of Glenmuick, 1681, M. 11,001; Relict of Rule *v.* Magistrates of Stirling, 1708, M. 11,002; Reid *v.* Melvil, 1664, M. 15,634.

was inconsistent with his claim of possession, and being so, negatived his alleged right. To a similar effect is the judgment in the case of Stirling (*a*), where the Court refused effect to thirteen years' use of payment to a minister of a certain amount of surplus teind duty, in respect that it was to this extent beyond that specified in the decret of locality.

CHAP. VII.

58. Yet if the deed or document founded on adversely to the incumbent's possession be latent and obtained without his knowledge, and if independently of it he have a good or colourable title to which his possession can be ascribed, he may still plead the rule with effect. Thus a minister who pursued for teind duties, of which he had by use of payment been in possession for thirteen years, was met by a decree of locality for a less amount of teind, which had been obtained by a heritor in the absence of the incumbent, was unknown to the minister and had not been acted on. In reply, he founded on the principle *decimæ debentur parochio* as a title to his possession, which the Court sustained, unless it was instructed that he or his predecessors had possessed the teinds under the locality (*b*). The title produced and founded on against the minister will of course likewise defeat his claim where it directly contradicts it or proves that it either never existed or has ceased to exist (*c*). Thus, in the case cited, the Court found that a claim to an annual rent by the Bishop of Dunblane founded on the use of payment thereof for thirteen years could not be sustained in the face of the terms of a grant of redemption of the annual rent. When the thirteen years' possession is ascribed by the incumbent to a title which is null in itself, such possession cannot confer a good title or justify continued possession (*d*). Neither did it do so where the claimant's collation to the

What if
title latent
quoad the
minister?

When title
produced
defeats
minister's
claim.

Possession
under a null
title.

(*a*) Relict of Rule *v.* Magistrates of Stirling, *cit.*

(*b*) Semple *v.* His Parishioners, 1676, M. 11,000.

(*c*) Bishop of Dunblane *v.* Kinloch,

1676, M. 7950; Grahame *v.* Ogilvie, 1682, M. 7955.

(*d*) Barclay *v.* College of St. Andrews, 1684, M. 11,001 and 7957.

CHAP. VII.

benefice was attributable to a presentation granted by one whose right of patronage had been reduced (a).

SECTION XIV.—*Thirteen years' possession, continuous and peaceable.*

Doctrine
adopted by
our law.

59. To enable a churchman to plead the rule with effect it was, according to the Canon law, essential that his possession of the subject should be at once peaceable and continuous throughout the entire period of the thirteen years. Our law recognises a similar principle. Few cases appear to have occurred in which the defence or reply to the rule of the thirteen years' possession pleaded by the incumbent has been rested on the exception, that the possession has been challenged or interrupted during the currency of the period. But the general doctrine as to the required continuousness of possession was recognised in the recent case of Cupar (b). Here it was decided that a minister who claimed as part of his benefice a subject which had been possessed as such for more than thirteen years about thirty years prior to the action, but which had been subsequently possessed during the interval by other persons under an adverse title, could not found on such possession as entitling him to sue a declarator and removing against the party in the occupancy of the subject.

Case of
Cupar.

Continuous
peaceable
possession.

60. While in this case the long period of non-possession—thirty years—was of course fatal to the minister's claim, the judicial opinions expressed seem to indicate that the Court would not be inclined to construe very rigorously the rule of continuous possession, but would rather be disposed to overlook in certain circumstances a short exceptional period of non-possession, or construe it so as not to exclude from the benefit of the brocard an incumbent whose posses-

(a) *Earl of Wigton v. Gray*, 1622, M. 10,998-9. See also *Crawford v. Crawford*, 1627, 1 Br. Supp. 142. (b) *Cochrane v. Smith*, 1859, 22 D. 252.

sion, although partially interrupted, was of a *bona fide* character (*a*). At the same time, the possession of the subject as part of the benefice must have been on "a footing 'permanent and not temporary or precarious' (*b*). It must also be peaceable and without lawful interruption (*c*).

61. Contrary to the doctrine of the Canon law in this respect, it is not necessary by our law to enable an incumbent successfully to plead the rule *decen. et trien. poss.* that he shall have been personally in possession of the subject during the thirteen years. Possession by one incumbent inures to his successor. It is sufficient, therefore, for the incumbent founding on the brocard to prove that the subject is possessed, and has for the period of thirteen years immediately preceding been uninterruptedly and peaceably possessed, as a part of the benefice—although in calculating this period the possession of a preceding incumbent or incumbents may require to be taken into account. Thus, in an action at the instance of an entrant incumbent to remove the relict of the previous minister from a house which she denied to be the manse, the Court found that "the last incumbent, his possession, was the present entrant, his possession, and that it "was enough to term him therein, in regard he or his authors "were *decen. et trien. possessors*" (*d*). Again, it was found in another case that where a minister and his predecessors have possessed lands as part of his benefice for the term of thirteen years, this is sufficient to secure him therein till his possession is successfully challenged in competent form (*e*). The doctrine in question was also recognised in the case of Cupar, already cited (*f*).

(*a*) See per Lords Wood and Benholme in *Cochrane v. Smith*, 1859, 22 D. at pp. 256, 260.

(*b*) Per Lord Benholme, *ibid.* at p. 260.

(*c*) See *per curiam* in *Hume v. Rislaw*, 1671, M. 15,638; and in *Bishop of Dunblane v. Kinloch*, 1676, M. 7955, at top.

(*d*) *Craig v. Hillhead*, 1664, M. 10,999; see also *Minister v. Magistrates of Arbroath*, 1715, M. 8502.

(*e*) *Gordon v. Ogilvie*, 1776, 5. Br. Supp. 540.

(*f*) Per Lord Wood in *Cochrane v. Smith*, 1859, 22 D. at p. 255, foot.

Possession
need not be
personal.

CHAP. VII.

SECTION XV.—*Effect to which the Rule decen. et trien. poss. may be founded on.*

Pleadable only
in *possessorio*.

62. The rule cannot be founded on to acquire or even to re-acquire possession, but merely to maintain or vindicate possession. Thus it cannot be pleaded by one who is not in possession of the subject; or, to express it otherwise, it cannot be pleaded *in petitorio*, but only *in possessorio*. This principle was distinctly announced in the case of Cupar (*a*), and is in accordance with the general bearing of all the decisions on this subject, although some of them may at first sight seem to lead to a different conclusion (*b*).

Yet pleadable
by the minister
as a pursuer.

63. While this is so, however, it does not follow that the minister can plead the brocard only in the character of a defender. On the contrary, he can quite competently plead it as a pursuer. He can do so when he is in the *de facto* possession of the subject, with a view of securing or maintaining such possession (*c*), or his representatives may pursue as in his right (*d*). He can, however, further do so even when he is not in the actual possession of the subject, and when the very object of the action is to attain such possession—the reason of this being because law recognises possession by the preceding incumbent as imputable to and therefore capable of being founded on by his successor. In various instances, accordingly, an entrant minister has pleaded, without successful objection as to relevancy, and in some cases with effect, the thirteen years' possession of his predecessor as a good ground for succeeding in an action to obtain the actual occupancy of the manse or glebe of which he is assumed to be in the constructive possession through his predecessor (*e*). In each of

(*a*) Per Lords Wood and Cowan in *ibid.*, at pp. 256, 258.

(*b*) See, for example, *Maxwell v. Rodger*, 1630, M. 10,638; *Craig v. Hillhead*, 1664, M. 10,999; and *Greig v. Duke of Queensberry*, 21st Nov. 1809, F.C.

(*c*) *Reid v. Melvil*, 1664, M. 15,634; *Minister v. Magistrates of Arbroath*

1715, M. 8502; *Semple v. His Parishioners*, 1676, M. 11,000; *Birnie v. Brown*, 1678, *ibid.* 2489.

(*d*) *Relict of Rule v. Magistrates of Stirling*, 1708, M. 11,002.

(*e*) *Craig v. Hillhead*, 1664, M. 10,999; *Greig v. Duke of Queensberry*, 21st Nov. 1809, F.C.

the cases cited, accordingly, the action brought, although in form petitory, was in its nature and object truly possessory, and therefore competent under the rule.

CHAP. VII.

64. It has been laid down that a judgment pronounced in the minister's favour, in an action either against him or at his instance, in which he successfully maintains or vindicates possession, actual or constructive, of a subject, *qua* benefice, in virtue of the brocard, would have the effect of conferring a "proprietary right" to the subject as part of the benefice (*a*) in favour of him and his successors in the cure. The proper form in which to challenge the right of an incumbent who has been thirteen years in possession of the subject as his benefice is by way of reduction, if he has so possessed under a written title, and if without a written title by way of declarator (*b*).

Effect of judgment in minister's favour.

Form of challenge of incumbent's right.

SECTION XVI.—*Application of the Rule* decen. et trien. poss.

65. It has been already observed that by our law this rule is applicable both to the temporality and spirituality of benefices. The cases above cited justify this remark, and serve to show that the rule has in point of fact been so applied indiscriminately. From a judgment, however, in 1737, it might be inferred that the scope of the brocard was confined to Kirk lands and livings, and did not embrace any subject, though falling within the category of the benefice, which had "its original" since the Reformation (*c*). It was there decided that the incumbent could not found on the rule to vindicate his right to the possession of minister's grass, as this provision "had its original long since the Reformation." The *ratio* of this judgment is inconsistent with many decisions both before and after its date, which have been pronounced

Quoad temporality and spirituality of benefice.

Case of Dunipace.

(*a*) Per Lord Wood in *Cochrane v. Smith*, 1839, 22 D. at p. 255, foot. In using the phrase "proprietary right," his Lordship meant an indefeasible right to the subject as part of the benefice.

(*b*) *Gordon v. Ogilvie*, 1776, 5 Br. Supp. 540.

(*c*) *Minister of Dunipace v. Lady Dunipace*, 1737, M. 11,004.

CHAP. VII.

Erroneous
ratio deci-
dendi.

Rule of even
wider
application.

To what class
of vicarage
teind
applicable.

on the footing that no such limitation of the rule applied. Such a limitation of the rule is not justified by principle, and has been all but directly contradicted by modern judicial opinion (*a*). From the report of the case of Dunipace it appears that the judgment was pronounced under a misapprehension of the import and bearing of the Act of Sederunt therein referred to, and a confusion of the rule *decen. et trien. poss.*, with that of the period of ten years mentioned in the enactment (*b*).

66. While the rule does not apply to vindicate possession to subjects, although *quasi* ecclesiastical—such as a burial-place in the churchyard, at least as in a question between laymen (*c*)—it seems plain that it is pleadable by incumbents *quoad* any subject which can strictly be said to form part of the benefice, even although it may not consist of Church lands or livings, or may not have had “its original” prior to the Reformation. Accordingly, an incumbent who had enjoyed thirteen years’ possession of the salmon fishing *ex adverso* of his glebe successfully founded upon the rule in vindication of his right to these fishings (*d*). The rule *decen. et trien. poss.* has been successfully pleaded by a minister against his heritors in connection with a claim for manse rent (*e*), and in one meagrely reported case for services of carrying coals and furnishing quantities of butter (*f*).

67. As thirteen years’ possession does not constitute a prescriptive title, an incumbent cannot found upon it to enforce payment of commodities of an unusual kind as

(*a*) Per Lord Benholme in *Cochrane v. Smith*, 1859, 22 D. at p. 260.

(*b*) The Act of Sederunt alluded to is that of 16th Dec. 1612, afterward quoted and commented on. This enactment does not, as the report bears, adopt the period of thirteen years prior to the Reformation as the period during which the state of possession was formerly to be proved. The period mentioned is ten years, and, as is afterwards explained, the rule announced in this Act of Sederunt had reference to rights of *property* in Kirk lands and livings. It does not allude to the *decen. et trien. poss.*, and has no real bearing upon this rule.

(*c*) See finding in *Laird of Philorth v. Heritors of Rathan*, 1666, M. 5620.

(*d*) *Gilmour v. Sutherland*, 1900, 38 S.L.R. 561.

(*e*) *Minister v. Magistrates of Arbroath*, 1715, M. 8502.

(*f*) *Minister v. Heritors of Morebattle*, 1733, M. 11,003.

vicarage teind, which are only due *qua* teind by use of payment for forty years. Such possession will, however, suffice to support the minister's claim to continued payment of articles which are included within the usual species of vicarage teind (*a*), among which are included calves, lambs, and wool (*b*). A servitude of pasturage attached to Kirk lands may by their designation be transferred to the benefice in proportion to the extent of the lands designed (*c*), and doubtless the rule of *decen. et trien. poss.* would be available to an incumbent pleading it in support of his continued possession of such a servitude. The benefit of the rule does not extend to a layman, and accordingly it was held that a precentor could not take benefit by it, he not being an ecclesiastical person (*d*).

SECTION XVII.—*Rule of the Seven Years' possession in favour of Churchmen.*

68. Besides the rule *decen. et trien. poss.*, competent to churchmen, it appears that they are likewise entitled to plead the benefit of a possessory judgment founded on seven years' uninterrupted peaceable possession. This right on their part seems to be different from, and in its nature more favourable on their behalf than, the corresponding common law right competent to laymen and the public generally. To enable a person to plead the common law right it is essential that he not only prove continuous possession of the subject for the period of seven years, but, further, that he instruct some special title in his favour, such as a sasine or lease, to which such possession can be ascribed (*e*).

69. An incumbent, however, appears to be entitled to plead seven years' possession of a subject as part of his title necessary.

(*a*) *Per curiam*, Birnie *v.* Brown, 1678, M. 2489 and 11,000.

(*b*) See case last cited; and Minister of — *v.* Elphinston, 1666, M. 15,723; Minister *v.* Parishioners of Elgin, 1668, M. 15,724, and 1 Br. Supp. 569; Grant *v.* M'Intosh, 1678, M.

10,763; Hunter *v.* Duke of Roxburgh, 1796, M. 15,728.

(*c*) Nairn *v.* Tweedie, 1605, M. 5143.

(*d*) Traill *v.* Dangerfield, 1870, 8 M'P. 579.

(*e*) Ersk. ii. 6 28; and iv. 1, 50.

CHAP. VII.

benefice, to the effect of enabling him to retain the possession or enjoyment of the subject, until the question of right is determined in an appropriate action, without instructing any special written title thereto other than his induction to the benefice. This view is adopted by Mackenzie (*a*). It is recognised by decision (*b*) in connection more particularly with the payment of stipend; but from the judicial opinion expressed in the case of Cupar (*c*) it may be inferred that the rule in question applies also to the temporality of the benefice.

Other than
that of
incumbent.

70. When it is said, as above, that a minister, *qua* incumbent, can plead the seven years' possession without a special written title to the subject, this must be understood as other than and in contrast to a title to the benefice by presentation and induction. A title of this latter kind, however, is assumed, because he can only plead the possession *qua* incumbent, and with reference to a subject which is claimed as part of the benefice, to which in virtue of his title as incumbent he has right (*d*).

Distinction
between the
thirteen and
the seven
years'
possession.

71. The distinction in point of legal effect between a judgment pronounced in favour of an incumbent proceeding on seven years' possession on the one hand, and on thirteen years' possession on the other, has been thus stated, viz. that while a judgment in the former case is in its nature and effect merely possessory, and therefore temporary, until the matter be tried out in an appropriate action, in the latter it

(*a*) Mack, Obs. p. 227.

(*b*) Peter v. Mitchelson, 1665, M. 10,640; Minister v. Heritors of Skein, 1675, 1 Br. Supp. 731, 2 Br. Supp. 183; Malcolm v. Irving, 1697, M. 14,791. See also Veitch v. Wedderlie, 1672, M. 10,640. In the old case of Annandale v. Rodger, 1630, 1 Br. Supp. 306, where the minister founded on seven years' possession of certain alleged glebe lands in answer to a removing therefrom, the Court repelled this defence, but on what ground does not appear.

(*c*) Per Lord Wood in Cochrane v. S ith, 1859, 22 D. at p. 255, foot.

(*d*) This principle is illustrated by the old case of Ramsay v. Roxburgh, 1610, M. 15,626, where a claim was made by the vicar of the parish for continued payment to him of certain teind sheaves, of which he had been in possession for ten years. In respect, however, that such teinds were legally due to the parson, and that his character of vicar, therefore, gave him no common law right to parsonage teinds, it seems to have been ruled that such *de facto* possession, without a special title by writ, would not avail him.

serves not only to maintain the incumbent in possession, but also amounts to a decerniture that the subject so possessed belongs to and forms part of the benefice, and to this effect operates as a written title of property in the subject (*a*). The few cases in the books on the subject of the septennial possession by incumbents do not indicate whether in pleading this rule it was essential that the possession on the part of the incumbent had been a personal possession exclusively on his part or not. On this, as well as on other points connected with the rule of the septennial possession, the authorities throw little light.

SECTION XVIII.—*Prescriptive Title by Thirty Years' possession in ecclesiasticis.*

72. Besides the two rules of the thirteen years' and of the seven years' possession adopted by our law for the purpose of securing incumbents in the continued enjoyment of subjects possessed by them as being or forming part of their benefices for those periods respectively, there was formally introduced into or recognised by our law at an early period another rule, whereby rights of property in Kirk lands and rents should be ascertained or determined by virtue of the continuous possession of them by churchmen for a determinate period. This rule is expressed in the Act of Sederunt of 16th December 1612, quoted below (*b*).

Rule expressed
in A. S. 16th
Dec. 1612.

(*a*) See per Lord Wood in *Cochrane v. Smith*, 1859, 22 D. at p. 255, foot.

(*b*) "The Lords of Council and Session, considering that at the time of the Reformation the old foundations, mortifications, and other writs and securities of Kirk lands and rents were for the most part destroyed and lost in that troublesome time: upon consideration whereof, the Lords of Council and Session for the time, and since, have been in use to decide all controversies arising upon the rights of Kirk lands, where no mortifications, infestments, nor

"other rights or titles by writ were
"extant, by their possession, which
"the saids kirk men had of the same
"Kirk lands and rents the time of
"the Reformation, and by the space
"of ten years immediately preceding
"the same. And now the said Lords
"understanding that it is above fifty
"years since the said Reformation,
"so that after so long a space witness
"cannot be had to prove and verify
"the said kirk men's possession of
"their Kirk lands and rents ten
"years together before the said
"Reformation: Therefore the said
"Lords presently declare, that in all

CHAP. VII.

Former rule
of decennial
possession.

73. From the terms of the Act of Sederunt it appears that the Court had theretofore been in use to determine questions involving the disputed ownership of "Kirk lands and rents" on the evidence as to the state of possession of the subject in controversy for ten years preceding the Reformation. The difficulty, however, of obtaining such evidence gradually increased as the date of that event became more distant, and by 1612 it would naturally be the case, in most instances, that the witnesses who could have given evidence on the subject were dead.

Period of
thirty years'
possession.

74. The period of possession, accordingly, which was to afford an index or criterion of the right of property in "Kirk lands or rents" required to be changed, and as the enactment states, this period was thereafter to be that of "forty or at least thirty years continually and immediately preceding the intenting of the action." The state of possession during this period—which was to be proved by "famous witnesses"—was to determine the point of ownership in Church lands and rents, when—but only when—"foundations, mortifications, and other authentic writs" were not produced.

Change in law
not effected
by the A. S.

75. This change in the law, if so it may be called, was not effected by the Act of Sederunt, but by the practice of the Court, of which the enactment, as indeed it states, was in truth but a formal announcement. Thus two days before its date it was judicially decided (a) that thirty years' possession *in ecclesiasticis*, ought to be a sufficient title in place

"time to come after the date of this
"present Act, they will decide all
"questions arising betwixt parties
"anent the rights of Kirk lands and
"livings pertaining to kirk men by
"their possession of the same Kirk
"lands and rents thereof for the
"space of forty, at least thirty years,
"continually and immediately pre-
"ceding the intenting of their actions,
"or proponing of their defences con-
"cerning their rights to the said

"Kirk lands and rents thereof, in all
"time hereafter: to be proven by
"famous witnesses, when all the
"foundations, mortifications, and
"other authentic writs shall not be
"alleged or produced in judgment
"to verify the saids Kirk lands and
"rents to appertain and to have
"appertained to the Kirk of before."

(a) Earl of Home v. Buccleuch, 7th
Dec. 1612, M. 10,998 and 7972.

of the "old custom" which required ten years before the Reformation.

CHAP. VII

76. From the terms of the Act of Sederunt it would appear that the rule which it announces had reference solely to the determination of questions of right or property in or directly connected with "Kirk lands," and the revenues or patrimony generally, which of old belonged to the Popish churchmen (*a*), and had no direct application to questions concerning the rights of the Reformed clergy in their benefices, whether stipend on the one hand, or manses and glebes assigned to them by designation on the other. When no mortification or other writ could be produced, it would appear from a case in 1629 (*b*) that it was competent to select as the period of possession to be proved the period either of the immediately preceding thirty years, or of the ten years prior to the Reformation.

Application of the rule.

Alternative period of possession.

SECTION XIX.—*Prescriptive Title by Forty Years' possession.*

77. A few years after the above Act of Sederunt, the statute 1617, c. 12, was passed, by which it is provided that whatever heritages the lieges had possessed by themselves or others in their right in virtue of infeftments under charters, retours, or precepts of *clare constat*, for the space of forty years, continuously and without lawful interruption, should be protected against all challenge of their rights of property therein, save on the ground of forgery. The provisions in this statute neither supersede nor interfere with those in the Act of Sederunt. The latter are confined in their application (1) to Kirk lands and the patrimony of the Popish churchmen generally; and (2) to cases where no written title to these subjects exists. The former are applicable to heritable subjects generally, and presuppose infeft-

Act 1617, c. 12.

Contrast between it and the A. S.

(*a*) *Ibid.* See also per several of the Judges in *Laird of Philorth v. Heritors of Rathen*, 1666, M. 5620, as stated by the reporter at p. 5621.

(*b*) *Marshall v. Drumkilbo*, 1629, 1 Br. Supp. 62 and 378.

CHAP. VII.

Act 1617, c.
12, founded
on *quoad*
Church
property.

ment under a written title, *ex facie* regular, to which the possession had may be ascribed (*a*).

78. The provisions of the Act 1617, c. 12, have frequently been appealed to and applied in vindicating rights of ownership in connection with Church benefices and *quasi*-ecclesiastical property. The general rules, both of the negative and the positive prescription, have been successfully pleaded at once on behalf of and against the Church and the owners of such property (*b*); and this in connection with subjects as well moveable (*c*) as immoveable (*d*).

(*a*) Ersk. iii. 7, 3-5.

(*b*) *Ibid.* 7, 32.

(*c*) Beadmen of Magdalen Chapel *v.* Drysdale, 1671, M. 11,148; King's College of Aberdeen *v.* Earl of Northesk, 1675, M. 11,149. See also Grahame *v.* Ogilvie, 1682, M. 7955; Minister of Falkland *v.* Johnston, 1793, M. 5155.

(*d*) Stair, ii. 12, 13. Parishioners

of Aberscherder *v.* Parish of Gemrie, 1633, M. 10,972. See also Thomson *v.* Magistrates of Dunfermline, 1747, M. 11,275, where, against a claim for manse maill by the minister, the defence of the negative prescription was pleaded without objection, on the ground of irrelevancy, though unsuccessfully on the merits.

CHAPTER VIII.

ON MINISTER'S STIPEND (*a*).

SECTION I.—*Introduction of Teinds.*

CHAP. VIII.

1. For some centuries after the institution of the Christian Church the fund for the support of its ministers principally, if not exclusively, consisted of voluntary contributions of money and other offerings, together with the revenues derived from such real property as it possessed. This fund was professedly applied in equal proportions toward the support—*1st*, of the bishop; *2nd*, of the clergy of the diocese; *3rd*, of the poor; and *4th*, of the fabric of the church and the residence of the bishop. The one-fourth share so appropriated to the clergy was in use to be divided among them by the bishop of the diocese (*b*). Alleged unfairness, however, in the allocation to them of his share, together with the inequality which existed in the extent of the liberality of different communities, ultimately resulted in a violent agitation for the attainment of a more ample and certain source of emolument, and one which should partake less of the character of eleemosynary aid and more of the character of a recognised legal provision. This agitation ultimately resulted in the recognition by the laity of the claim advanced by the clergy to a certain proportion of the fruits of or income derived

Clergy whence supported prior to introduction of teinds.

(*a*) To prevent misconception as to the scope of this chapter, the author desires to state that it deals with the rights of incumbents only, and does not profess to deal either with the subject of teinds generally, or even with that department of the subject to which the process of locality immediately relates, and which involves

the ascertainment and determination of the rights and liabilities of the proprietors of, or the intromitters with, the teinds of the parish after a stipend has been modified. For information on these subjects the reader is referred to the works of Forbes, Connell, Buchanan, and Elliot.

(*b*) Ersk. ii. 10, 2.

CHAP. VIII.

from secular industry and property, or, in other words, as right to tithes or teinds.

Origin of
teinds.

2. The origin as well as the precise nature of the obligation to pay teind are matters of uncertainty and dispute. On the alleged authority of Father Paul and Montesquieu, Erskine states that tithes were not exacted by the Church until toward the end of the eighth or beginning of the ninth century. There seems little reason, however, to doubt that the obligation to pay tithe had been formerly asserted by the clergy of the Western Church, if not recognised by the laity, at least two centuries earlier than this, namely, at the date of the Second Council of Tours, in the year 567. By the subsequent Council of Mascon, *anno* 585, the punishment of excommunication is denounced against those who refuse to pay tithe (*a*). Alluding to the terms of this decree, the annotator on Ferraris remarks that it seems to hint at the fact that prior even to the above Council of Tours the payment of tithe had been demanded as a matter of legal right by the Church (*b*).

Of divine or
human obli-
gation ?

3. A majority of the canonists agree in tracing the institution of tithes to a Scriptural origin (*c*); and a large number of them further assert that the obligation on the lay members

(*a*) Referring to the origin of tithes, Walter, Manuel du droit Ecclesiastique, says, § 244: "En occident, " au sixième siècle, les lois pénétrèrent plus avant; et dès le règne de Charlemagne, l'obligation de la dime fut garantie par des pienes ecclésiastiques, même par des voies civiles de contrainte."

(*b*) See Biblioth. Canon. voce "Decimæ," art. 1, § 44 *et seq.* What the annotator of Ferraris alludes to in support of his remark is probably a pastoral letter addressed by the Bishops of the Province of Tours to the laity within their dioceses on the occasion of the convocation at the said Second Council of Tours in 567. The text of this letter, which is manifestly very inaccurate and defective, was edited by Father Jacobus Sirmondus, the Jesuit,

from certain imperfect MSS. The rubric prefixed to the letter, which will sufficiently indicate its import, is in these terms:—"Hortantur ut imminenter cladem avertere studeant; ideoque nuptialia vota differant rerum omnium decimas persolvant, cum inimicis redeant in gratiam; mancipiorum etiam decimas offerant, et qui mancipiis carent, pro singulis filiis singulos dent tremisses; incestas denique conjunctiones dissolvant." — See "Acta Conciliorum," &c. vol. iii. p. 367, Paris, 1714; and also "Concilia antiqua Galliæ," as originally collected by Sirmondus, vol. i. p. 343, published 1629.

(*c*) See Gen. xiv. 20, and xxviii. 22; Exod. xxii. 29, 30; Lev. xxvii. 30-33; Numb. xxviii. *passim*.

of the Christian community to support their clergy by payment of a tenth or other fixed proportion of their means is recognised and enforced by Divine authority (*a*). On the other hand, many of the canonists dispute this latter view, and maintain, as regards both the existence and the amount of this ecclesiastical impost, that liability for payment of it proceeds from a merely human obligation which has been introduced and is enforceable by human law alone.

SECTION II.—*Division of Teinds.*

4. The canonists generally divide tithes into (1) real or predial, and (2) personal. Real or predial tithes are those derived from the fruits of the ground, as grain. Personal tithes are those derived from the profits of personal labour or industry, as the gains of trade or merchandise. Some authors recognise another division of tithes, viz. mixed tithes, or those which are attributable partly to the productiveness of the soil, and partly to human skill and culture. Yet as this mixed character belongs to most of the fruits grown in European countries—for these are generally industrial—the majority of canonists do not treat such teinds as belonging to a separate class, but include them under the category of real or predial tithes as above mentioned (*b*).

5. Within the class of predial tithes are included, by the law of Scotland, both the natural and the industrial fruits of the land, the latter of which substantially correspond to the *decimæ mixtæ* of the canonists. Save in exceptional cases, personal tithes do not seem to have been recognised by our law (*c*). Industrial, predial, or mixed tithes, including therein the tithe of animals and their produce, substantially exhaust

(*a*) See Matt. x. 10; Luke x. 7; and 1 Cor. ix. 7–14.

(*b*) See Barbosa, *Jus Eccles. Univ.* lib. iii. cap. 26, n. 9; and Dict. de droit Canon., par Durand de Maillane, voce *Dixmes*; and Ersk. Inst. ii. 10, 10.

(*c*) Ersk. ii. 10, 10. An exception to

this effect occurs in *Birnie v. Brown*, 1678, M. 2489, 11,000, where the Court in respect of prescriptive usage decerned for a yearly sum out of each weaver's loom, and for the salt made in the parish, although *decimæ industriales*.

CHAP. VIII.

Parsonage
teinds.Vicarage
teinds.

the range of teindable subjects by our law, which divides tithes into two classes, viz. parsonage and vicarage teinds. Parsonage teinds, styled also *decimæ rectoriæ*, or *decimæ garbales*, or *decimæ prædiales majores*, are exclusively, or almost exclusively, leviable from grain raised from seed sown in cultivated ground, as wheat, oats, or barley (*a*). Vicarage teinds, styled also *decimæ minores*, embrace certain natural and less valuable kinds of agricultural produce as well as certain animals and their produce—as natural grass or bog-hay (*b*), kail, carrots, herbs, roots (*c*), calves (*d*), lambs, stirks, butter, cheese (*e*), herring, and ling (*f*), &c.

SECTION III.—*Application of Rule Decimæ debentur
Parocho.*

Teinds
originally paid
to the clergy.

6. All teinds were originally payable in kind to the clergy; and after the introduction of parishes the teinds within each parish naturally came to be levied or collected by its incumbent, as the person for whose support the same were to be applied. Hence the brocard, *decimarum perceptio ad solos parochos de jure communi pertinet* (*g*). Erskine observes “that this rule, *decimæ debentur parocho*, never universally obtained at any period of time;” and he mentions various ways in which the parish clergyman’s right to teinds was impaired or defeated, including—1st, the appropriation by patrons, on a vacancy occurring in the parish, of the teinds to a cathedral church or monastery; 2^d, papal exemptions; and 3^d, the infeudation of tithes to laymen (*h*).

(*a*) Ersk. ii. 10, 13. The expression, *decima pars fructuum crescentium*, is applied in this sense to parsonage as opposed to vicarage teinds.

(*b*) Brown v. Hunter, 1796, M. 15,730.

(*c*) Burnet v. Gibb, 1676, M. 15,640 and 15,725.

(*d*) Grant v. M’Intosh, 1678, M. 10,763.

(*e*) Baillie v. His Tenants, 1611, M. 15,722.

(*f*) Minister of North Leith v. Merchants of Edinburgh, 1666, M. 10,890. Vicarage teinds are now in desuetude, except when supported by use of payment. See Elliot, Teind Court Procedure, p. 74.

(*g*) See Barbosa de Officio et Potest. Parochi, pt. iii. ch. 28, § 2, sec. 7.

(*h*) Ersk. ii. 10, 11.

7. While each of these causes may have extensively operated at once to diminish the emoluments or income of individual incumbents, and to impair the wealth and revenues of the Church, they were encroachments upon, rather than any contradiction of, the rule above stated, which, although impaired in its application, was still in force down to the period of the Reformation. Many parochial incumbents were, *qua* parsons, titulars of the tithes of their respective parishes; and the clergy generally regarded tithes as their peculiar patrimony. Even after 1560 the (Protestant) Church claimed the teinds as her proper patrimony, and this claim seems at one time to have been authoritatively recognised (*a*). CHAP. VIII.
How long rule
recognised.

SECTION IV.—*Origin and nature of the Assumption of
Thirds.*

8. In view of the Reformation, the approach of which had long been foreseen, the Romish clergy, fearing that this event might furnish the reason, or at least the pretext, for depriving many of them of their benefices, anticipated to some extent this result by granting, on the most favourable terms they could secure, feus or long leases of their manses, glebes, and tithes (*b*). When the storm broke the great bulk of the property belonging to the Romish Church was, by annexation, confiscation, or otherwise, acquired either by the Crown or by the nobles and influential proprietors throughout Scotland. Ere this was accomplished, however, various compromises were proposed on behalf of the Romish clergy with the view of saving from the general wreck of their property, which appeared imminent, a certain portion of their valuable possessions. Alienation by
the clergy of
their benefices.

9. A proposal was accordingly made on the part of certain prelates to Queen Mary to the effect that, on their giving up to Her Majesty one-fourth of the revenues of their benefices Proposal by
prelates to
Queen Mary.

(*a*) See terms of Act 1567, c. 10, —1563, c. 72; 1564, c. 88; 1584, c. 7; 1593, c. 186; 1594, c. 203. See quoted *infra*, sec. 11.

(*b*) Such alienations are struck at or referred to in the following Acts: 1666, M. 16, 473 and 2840.

CHAP. VIII.

they should be allowed to retain the remaining three-fourth parts. On the basis of this arrangement three Acts of Council were passed ordaining rentals to be returned of all the ecclesiastical benefices within the kingdom, and factors were appointed to uplift one-third of the revenues thereof, which was the proportion ultimately fixed upon as that to be appropriated to the support of the Reformed clergy. This scheme or plan for the support of the Reformed clergy, known as "the Assumption of Thirds," was subsequently sanctioned and ratified by Parliament (a).

Assumption of
Thirds.

Amount of
stipends
modified out
of "thirds."

10. Collectors of these revenues having been appointed, returns thereof were made, beginning with the year 1560. When these were completed the stipends payable out of the "thirds" were modified by Commissioners, the maximum stipend to the ordinary clergy being 300 merks, or somewhat above £16 sterling. In consequence of the inadequacy of these provisions, which were also in most instances very irregularly paid, the General Assembly applied, in 1564, to the Queen for a more ample and appropriate fund of support, and in particular demanded that a proportion of the revenues of the respective benefices should be allocated to the Reformed clergy throughout the country. Although this demand was not *in terminis* granted, the general fund for their support was somewhat enlarged.

Provision of
the Act 1567,
c. 10.

11. The regular payment, however, of stipends continuing to be in a great measure evaded, the Act 1567, c. 10 (b), was passed, which, on the narrative that "the ministers hes bene lang defrauded of their stipendis," ordained that "the hail thrids of the hail benefices of this realme" be first paid to the clergy, and authorised the Lords of Session to grant warrant for charging all liable in payment thereof "to obey

(a) See 1567, c. 10; 1581, c. 100; and 1592, c. 123.

(b) Alluding to this Act, Lord Elchies says, by it "the third of the whole benefices, which includes the 'teinds, is resumed, first for stipends

"to ministers, and next for the King's use, and thereby the ministers become stipendiaries,"—See Spottiswood *v.* Kirkpatrick, 1752, Elchies, *Teinds*, 32, and Notes, p. 474.

“the said ministers and their collectours,” notwithstanding of any discharge granted to them by the Queen, “ay and quhill the Kirk come to the full possessioun of their proper patrimonie, quhilk is the teindes.” This Act seems to confer on, or to authorise as belonging to, the clergy the right of appointing their own collectors, whose orders in the collection of “thirds” the Court was bound to enforce.

SECTION V.—*Appointment of Commission of Plat, and payment of Ministers' Stipend down to 1617.*

12. Some years after the date of the Act 1567, c. 10, the Reformed clergy were induced, on promise of more liberal provisions being made to them, to consent to the “thirds” being uplifted as formerly by collectors appointed by the Crown. In apparent fulfilment of this promise—which, however, was not really kept—the Government appointed in 1573 a Commission, styled the Commission of Plat, of new to modify stipends, which was done, just as before, out of the “thirds” of the benefices already appropriated for this purpose (a). On the restitution of the estate of bishops by 1606, c. 2, the revenues of the benefices belonging to their Sees were

Thirds uplifted by Crown collectors.

Commission of Plat.

(a) See Hope's Minor Pract. p. 103; 1 Connell, Tithes, chapter 2; Russell's Forms of Process, p. 194. In Buchanan v. Magistrates of Dunbar, 1866, 4 M.P. p. 1023, Lord President Inglis refers to a decret of modification of stipend, dated 18th Feb. 1618, and evidently pronounced by the Commissioners under the Act 1617, c. 3, as “not a decree of a Commission of Teinds in the ordinary sense, but of a different Commission from the Commission of Teinds appointed in 1633, namely, a decree of the Commissioners of Plat, who were appointed for a temporary purpose, and are not to be regarded as the predecessors of this Court.” The meaning here attached by his Lordship to a decret of Plat is sometimes met with.—See Mack. Obs. on Act 1617, c. 3, p. 341; Morton v. Scot, 1625, M. 14,784; Swintoun v. Bishop of

Edinburgh, 1669, 1 Br. Supp. 584; and College of Aberdeen, 1676, M. 14,789. The term, however, as now generally understood, is applied distinctively to decreets providing stipends, which were modified out of the thirds of benefices by the Commissioners of Plat prior to 1617, as in contrast to decret modifying stipends out of teinds pronounced by the Parliamentary Commissioners under the Acts 1617, c. 3, and subsequent statutes. It is not clear why the Lord President described the Commission of 1617 as having been “appointed for a temporary purpose, and not to be regarded as the predecessors of this Court.” That Commission was appointed to modify perpetual local stipends, and its functions differed only in matter of detail from those of the Commission of 1633 and subsequent Commissions.

CHAP. VIII.

exempted from contributing toward the "thirds." This necessarily limited to a proportional extent the fund whence the Commissioners of Plat modified stipends to the Reformed clergy, and in a corresponding degree the labours of the Commissioners. For some time after 1573 they held annual meetings at Edinburgh; and probably they continued, at least nominally, to act until 1617—when the first Parliamentary Teind Commission was appointed—although from the circumstances now alluded to their functions were greatly restricted after 1606.

Acts 1581, c.
100, and 1592,
c. 123.

13. In the meantime the Acts 1581, c. 100, and 1592, c. 123, were passed, the provisions of which were intended to secure the clergy in the more certain enjoyment of their stipends. Some of the expressions in the former statute seem almost to imply that it was thereby intended that a *local* stipend was to be modified to the minister of each parish, "according to the stait and habilitie of the place." This, however, was not the import, or at least the effect of its provisions. Save in exceptional cases stipends still continued to be payable out of the general fund of the third part of the fruits of the "hail benefices ecclesiastical;" and the clergy still continued dissatisfied with the small amount and unsatisfactory nature of such a provision. Their dissatisfaction was naturally increased by the Act 1606, c. 2, which, by annulling the Act of Annexation, 1587, c. 29, as regards, *inter alia*, the "thirds" of the rents of bishoprics, and securing these in their entirety to the dignitaries appointed thereto, diminished to a corresponding extent the amount of the fruits of benefices whence the stipends of the inferior clergy were payable (*a*).

Effect of the
Act 1606, c. 2.

Commission of
1606 upon
erected
benefices.

14. Numerous ecclesiastical foundations, with the lands and churches belonging to them, were erected into temporal lordships with the sanction of Parliament at the beginning of the seventeenth century. It was, however, a condition of

(a) See Forbes, Tithes, 125.

these erections that due provision should be made for the clergy of the parish churches which had belonged to the monasteries. Accordingly, by an Act of 1606 (not printed in the small volume, Thomson's Acts, vol. iv. p. 299), a Commission was appointed to which was assigned the duty of modifying stipends out of the benefices erected, and this was to be done before the charters following upon the Acts of Erection were issued. The stipends are narrated in these charters as burdens on the grant (*a*). This Commission modified stipends in the case of a great many parishes, as is shown by an examination of the Charters of Erection printed in the Register of the Great Seal. This Register was only recently published, and this may account for the fact that little notice has been taken of the operations of this Commission in the works of previous writers upon the subject. Subsequent to 1606 there were therefore, for a number of years, two bodies at work. There was the old Commission of Plat, which continued annually to give stipends out of the "thirds" to non-erected churches and churches which did not belong to bishops. On the other hand, there was the Commission for Erected Churches, which assigned permanent stipends to the ministers of these churches. Both Commissions are described as Commissions of Plat, but the name properly belongs only to the former. Stipends modified by the latter Commission differed in one important particular from the stipends modified by the Commission of 1617 and subsequent Commissions. They were not local stipends payable out of the teinds of each parish separately, but they were payable by the Lord of Erection or Titular out of the whole teinds of the erected churches generally.

15. The demand made by the General Assembly before 1606 (*b*) for local stipends to the clergy was renewed after the above Act of that year; but from a variety of causes this

Local stipends
assigned to
clergy by 1617,
c. 3.

(*a*) See Thomson v. Viscount Had-
dington, 1611, M. 14,783. With
reference to this Commission see
further, *supra*, p. 17-18.

(*b*) As in 1592 and 1596. See
Connell, Tithes, vol. i. p. 108, and
Appx. p. 34.

CHAP. VIII.

demand was not complied with by the Government until the passing of the Act 1617, c. 3. On the narrative that many kirks already planted had "no sufficient provision or maintenance," this statute conferred power on the Commissioners therein named, "out of the said teinds of every parochin, to appoint and assigne at their discretions, ane perpetual *local* stipend to the ministers present and to come at all kirks" not provided at all, or not provided with such a stipend as Parliament^a deemed sufficient.

SECTION VI.—*Right of Reformed Clergy to Stipend out of Teinds.*

Romish clergy
had a direct
right to teinds.

16. In virtue of their recognised right to a proportion of the fruits or produce of certain descriptions of property, as already explained, the Romish clergy before the Reformation claimed and possessed tithes as their own proper and peculiar provision. They enjoyed not only an interest in but a direct proprietary right to tithes. This right, however, on the part of the clergy was invaded on the Reformation. On that event tithes were on various pretexts and in various ways evicted from their former owners, diverted from their former use, and acquired and dealt with by the Crown and nobles as their own property.

Position of the
Reformed
clergy.

17. Thus, the Reformed clergy became little more than pensioners on the bounty of those who had despoiled them of what was admittedly their proper patrimony (*a*). Further, not merely were they reduced to the position of mere stipendiaries, but, from the character of the provisions assigned to them from 1560 to 1617, viz. out of the "thirds," these provisions formed a burden not directly upon teinds as a special fund, but upon a portion of the rents and revenues of the temporalities of ecclesiastical benefices. Although the

(*a*) This is recognised by the Legislature in the Act 1567, c. 10, where the passage occurs, "Ay and quhill

"the kirk come to the full possession of their proper patrimonie, quhilk is the teinds."

Reformed clergy generally still continued after this period to be stipendiaries, the Act 1617, c. 3, operated to make the provisions or stipends modified to them a direct and primary burden on the teinds of their respective parishes. To this limited extent their interest in teinds was recognised.

CHAP. VIII.

By 1617, c. 3,
stipend made a
burden on
teinds.

SECTION VII.—*Commission of 1617 for modifying Stipends.*

18. By the Act 1617, c. 3, the Commissioners therein named, or a quorum of them, were authorised, *inter alia*, to modify at their discretion a perpetual local stipend to the ministers of all parish churches either not provided at all with ministers and stipends or where the provision was less than 500 merks of annual value, or five chalders of victual (*a*), or such a proportion of money and victual as should amount to 500 merks (£27:15:6 $\frac{2}{3}$) or five chalders of victual annually, besides a manse and glebe. In any of the circumstances now mentioned the Commissioners might modify a stipend the minimum amount of which was to be as above stated, and the maximum amount ten chalders victual, or 1000 merks (£55:11:1 $\frac{1}{3}$), or proportionally money and victual, as was most convenient, in addition to a manse and glebe. Churches “planted,” *i.e.* provided with ministers whose stipends extended to the minimum or exceeded the maximum amount of stipend above stated, were expressly excepted from the Commission (*b*).

Stipends modified by 1617
Commission.

19. The number of Commissioners appointed by this Act was thirty-two, eight from each of the four estates of bishops, lords, barons, and burgesses; and it was specially declared that the assent of five Commissioners of each estate was necessary to validate their ordinances generally, including decrees of modification. From the decrees of this Commis-

Number of
Commis-
sioners.

Assent
required.

(*a*) This term is used to denote every species of corn or meal. See Connell, *Tithes*, vol. i. p. 114, footnote.

(*b*) Connell mentions that the Com-

missioners strictly adhered to the injunctions that they were not to meddle with any stipends above the minimum.—*Ibid.* p. 116.

CHAP. VIII.

Form of
process.

sion, registered under 1707, c. 9, it appears, as stated by Connell, that the Commissioners held their meetings at Edinburgh, and with the view of allocating stipends divided Scotland into districts comprehending three or more dioceses. The summonses of augmentation, which proceeded at the instance of the King's Advocate and the Procurator for the Church, were directed against the patron, titular, tacksmen of teinds, and the minister of the parish; and the demand or request for an augmented stipend was made sometimes by the bishop of the diocese, sometimes by the minister, and sometimes by the Presbytery (*a*). The stipends were local stipends in the sense of being payable out of the teinds of the parish, but it does not appear to have been the practice of this Commission to prepare a locality in the modern sense, localising the stipend upon the several lands in the parish (*b*). The Commission of 1617, which was appointed in June of that year, was to subsist only till Lammas 1618, or a period of about fourteen months.

SECTION VIII.—*Commission of 1621 for modifying Stipends.*Object of this
Commission.

20. Although a good number of stipends were modified under the Commission of 1617 (*c*), yet as at its expiry "divers "kirkes" still remained "disfurnished and unprovided of "competent meanes to be given to the ministers," another Commission was appointed by 1621, c. 5, for the purpose, *inter alia*, of modifying perpetual local stipends to the ministers of (1) all kirks not already "planted"; (2) kirks formerly united, but since disjoined; and (3) kirks erected for the first time. The number of the Commissioners appointed was in all twenty-four, being six from each of the said four estates, and the consent of four of each estate was declared necessary to validate any sentence pronounced by them.

(*a*) Connell, Tithes, vol. i. p. 116.(*b*) *Ibid.* pp. 462-4.(*c*) *Ibid.* vol. ii. Appx. p. 44. The list there given has since been suppl-

mented by the discovery of other cases in which this Commission modified stipends.

21. The amount of stipend which the Commissioners could modify was not in any way limited by that of the minister's existing provision, whether it was below the minimum or above the maximum, as prescribed by the former statute. The Commissioners had full power to increase (and apparently also to diminish) it at their discretion, subject only to this check, viz. that they were "not to alter or meddle with any kirk which was settled" by the Commission of 1617. The Commission of 1621 was to begin on 10th January 1622, and was to endure for a year and day thereafter. None of its original decrees have been preserved, and as none of them have been registered, it is probable that the Commissioners appointed under it never acted (a).

CHAP. VIII.

Powers of
Commission.SECTION IX.—*Commissions of 1627 and 1633.*

22. On his accession Charles I., by an Act of Privy Council dated October 12, 1625, revoked all former erections of Church lands, teinds, patronages, and Acts of Parliament ratifying the same; and as supplementary thereto the King raised in August 1626 a summons of reduction, the leading conclusions of which were to the effect—(1) that the patrimony of the Crown should be restored; (2) that kirks should be sufficiently endowed; (3) colleges, schools, and hospitals duly maintained; and (4) the gentry relieved of the heavy burdens imposed on them in the leading of their tithes. The nobles, lords of erection, and others who had been enriched by royal grants or had otherwise acquired lands, teinds, and rights of patronage which had formerly belonged to different orders of the Romish clergy, were naturally alarmed at this act of revocation, and the summons of reduction following on it; and with a view to the protection of their interests, which were thereby

Revocation by
Charles I.Summons of
reduction.

(a) Connell, Tithes, vol. i. p. 120. In a foot-note it is stated by Connell that he had seen some decrees of Commissioners acting about this period, which, assuming the dates to be correct, show that these Commis-

sioners did act. It is not known to what decrees Connell refers, and the present Teind Clerk has found no evidence that this Commission met or acted.

CHAP. VIII.

Commission
of 1627.

imperilled, they presented a petition to the King in November 1626, praying him to appoint a Commission to treat of the matters between them. Thereupon a Commission, commonly styled the Commission of Surrenders and Teinds, was granted by His Majesty in 1627, to certain persons therein named, to treat anent his revocation, and with power, *inter alia*, to the Commissioners "to make sufficient provision for those "churches wheirow the teyndis sall be reserved and disposed "as afoirsaid, if the saids churches be not already sufficientlie "provydit, and for provyding their ministers with sufficient "locall stipends and feis" (*a*). This Commission modified stipends in some parishes, but this was not done to a great extent, and apparently the Commissioners had some doubts in regard to their powers (*b*).

Teind submis-
sions ratified.

23. Submissions in regard, *inter alia*, to the valuation and sale of teinds and rights thereto, were in 1628 entered into with the King on the part of (1), the lords of erection and others, (2) the bishops and clergy, (3) the burghs, and (4) tacksmen of teinds on which decreets-arbitral were pronounced by the King in 1629. The proceedings of the Royal Commission of 1627 regarding the modification of ministers' stipends were subsequently ratified by the Act 1633, c. 8. Recognising the minister's right to stipend out of teinds, the Act 1633, c. 17, exempts from the teinds of his own lands, which each heritor is entitled to buy from the titular, "so "much as shall be locally assigned to the minister serving "the cure of the kirk."

Provision in
1633, c. 17.Commission
of 1633.

24. The Act 1633, c. 19, confers power on the Commissioners therein named, or fifteen of their number—after the closing of the valuations of each parish—to modify a constant local stipend to each minister, to be paid out of the teinds of each parish. It also specially ratifies the Act of the Royal

(*a*) In *Dunlop v. Commissioners of Woods*, 1858, 20 D. 1012, the reader will find this Commission printed, pp. 1015–20.

(*b*) Connell, *Tithes*, vol. i. pp. 339–343.

Commission of 1627, whereby that Commission fixed as the minimum of ministers' stipends—save in the case of particular kirks—eight chalders of victual, or 800 merks proportionally.

CHAP. VIII.

SECTION X.—*Commissions of 1641 and subsequent years.*

25. Various Commissions were subsequently appointed by the Acts undernoted (*a*), for the purpose of, *inter alia*, modifying and augmenting stipends, and granting localities to ministers. These Commissions likewise dealt with the purchase and sale of teinds, and with the alteration of parish boundaries, in connection with which latter subject they have been already adverted to (*b*). The Act 1641, c. 30, authorised augmentations to ministers of churches (not being bishops' kirks) who had not eight chalders of victual or 800 merks as the minimum amount (*c*), although the stipend had been modified by former Commissions. This Commission was renewed by 1644, c. 24, and 1647, c. 32.

Commissions
enumerated.

Commission
of 1641.

26. The Act 1649, c. 45, which deals also with the subject of manses, glebes, and ministers' grass, ordained the parishioners, when victual could conveniently be had, to pay their minister out of the teinds of the parish eight chalders of victual, and when victual could not be had, three chalders victual and money for the other five chalders, not exceeding £100 Scots, nor less than 100 merks for each chalder (*d*). All the Acts of Parliament or Conventions of Estates from 1640 to 1660 were rescinded at the Restoration by the Statutes 1661, cc. 6, 9, 8, 15, but the decrees of the Commissioners issued during these periods were excepted by saving clauses in the Acts 1661, cc. 9 and 61.

Commission
of 1649.

(*a*) Viz. 1641, c. 30; 1644, c. 24; 1647, c. 32; 1649, c. 45; 1661, c. 61; 1663, c. 28; 1672, c. 15; 1685, c. 28; 1686, c. 22; 1690, c. 30.

(*b*) *Ante*, CHAPTER I.

(*c*) For the mode of estimating this minimum, see Pollock *v.* Heritors of Killalin, 1740, Elchies, *Stipend*, 3, and Notes.

(*d*) In accordance probably with this rule or principle, the Commissioners in 1650 modified the following stipend to the minister of Beith, viz., 3 chald. oats, 1 chald. bear, 500 merks money, with 40 merks for communion elements.—Reid *v.* Heritors of Beith, 1766, 1 Hailes, 74.

CHAP. VIII.

Commission
of 1663.

Commissions
of 1672, 1685,
1686, and
1690.

27. The powers generally conferred on the Commissioners by the Act 1633, c. 19, in the matter of stipend were renewed by that of 1661, c. 61. Those conferred on them by the Act 1663, c. 28, were somewhat more specific, viz. "with power "to them, where ministers are not already sufficiently provided, or have not localities assigned to them for their "stipends, out of the teinds within the paroch where they "serve the cure, to modifie, settle and appoint constant local "stipends to ilk minister out of the teinds of the paroch "where they serve the cure, in so far as the same will amount "to, according to the quantities of victual or monies mentioned "in the said Acts and Commissions." Powers substantially similar were renewed by the Acts of 1672, 1685, 1686, and 1690 (*a*), of which it is sufficient to observe, that under them the Commissioners were authorised to modify and augment stipends and to grant localities to ministers accordingly.

SECTION XI.—*Powers of Parliamentary Commissioners vested in Court of Session.*

Powers transferred by 1707,
c. 9.

28. Shortly after the Union, the powers vested in the Commissioners under the then extant Commissions, viz. those under 1690, c. 30, and 1693, c. 23, were by the Act 1707, c. 9, transferred to the Lords of Council and Session, *qua* Commissioners for the Plantation of Kirks and Valuation of Teinds, who, as such, were and are authorised, *inter alia*, "to grant "augmentation of ministers' stipends" . . . "conform to the "rules laid down and powers granted by 1633, c. 19, 1690, "cc. 23 and 30, and 1693, c. 23" (*b*).

Practice of
Parliamentary
Commis-
sioners.

29. The practice of the earlier Commissions may be thus summarised:—1st, Prior even to the Act 1641, c. 30, which distinctly authorised an *augmentation* to at least eight chalders of the stipends of clergymen which were below that

(*a*) See note (*a*), p. 285.

(*b*) In the statute of Queen Anne this Act is cited as the 24th of 1693.

Neither the Act 1690, c. 23, nor that of 1693, c. 23, specially deals with modifying or augmenting stipends.

amount, the Commissioners had, in several instances, increased the amount of stipends which had been already modified by them or their predecessors. To this effect are the cases of Cramond in 1631, and of North Berwick in 1636 (*a*). In the former instance, the minister obtained from the Commissioners appointed in 1627 an augmentation of the amount of the stipend modified to his predecessor by the Commissions of 1617 or of 1621. In the latter case, the minister of North Berwick obtained a re-augmentation of his stipend. *2nd*, From the date of the Acts 1633, cc. 8 and 19, which omitted all mention of the maximum limit of stipends, the members of the various Teind Commissions acted on the principle that this omission imported a revocation of the statutory limit of ten chalders, or 1000 merks, fixed by 1617, c. 3, and frequently modified or augmented stipends to a greater amount. Thus, in the case of Mid-Calder (*b*), the Commissioners in July 1647 modified a stipend to the minister of that parish of 1200 merks. *3rd*, From the records which are extant of the various Teind Commissions, it would appear that in the majority of instances the Commissioners did not modify stipends much above eight chalders, or 800 merks, the minimum under the Acts of 1633 and 1641; and further, that very few augmentations of stipends already modified by them were granted, and re-augmentations only in very exceptional cases (*c*).

SECTION XII.—*Practice of the Permanent Teind Commissioners from 1707 to 1808.*

30. The Act 1707, c. 9, refers in particular to the "augmentation" of stipends, and the extensive jurisdiction

Powers of Commissioners.

(*a*) See Connell, Tithes, vol. i. pp. 340 and 353.

(*b*) *Ibid.* p. 358.

(*c*) This is attributed by Connell to the circumstance that "little or no change took place in the price of corn, or of the other necessities

"of life, between the reign of Charles I. and the Union; and all the stipends which were modified during any part of this period, if adequate at the time of the modification, must have remained so during the whole of it."—*Ibid.* p. 385.

CHAP. VIII.

conferred by it on the Court of Teinds in regard to the "plantation" and endowment of kirks, and the erection of new parishes, involved the possession of a power not only to increase existing stipends, but also to allocate or assign stipends to newly erected parishes. For a considerable time after the Union, the rules of law which had been given effect to by the Parliamentary Commissioners in granting or refusing augmentations were appealed to by applicants in the Teind Court as authoritative on the subject, and were not infrequently given effect to.

Re-augmentations.

31. Thus, although the point was for some time after the Union unsettled, it was ruled in the case of Abirlot (*a*) that a minister might obtain a re-augmentation although his stipend had been augmented (1) by a decree of the Commissioners in 1634; and (2) to an amount somewhat above 800 merks, being that recognised in the Act 1633, c. 8. Again, in the case of the minister of Bellie (*b*) the Court augmented his stipend to 1200 merks (being above the maximum mentioned in the Act 1617, c. 3), although the same had been modified in 1650 at 800 merks.

Re-augmentation of stipends modified after 1688.

32. Among other cases, Connell quotes those of Dalton in 1727, Kirkcudbright in 1733, and Stair in 1740 (*c*), as showing that the Teind Court refused to augment stipends which had been modified subsequently to the Revolution (1688). None of these judgments, however, refusing augmentations distinctly bear to proceed on such a footing, or disclose anything beyond this, that, in the circumstances, the Court did not see cause to grant the augmentations. The question was finally decided by a series of judgments of the House of Lords. In the case of Kirkden, where the stipend had been augmented *after* the Union, the Teind Court, by a majority, held that the pursuer was thereby barred from demanding a re-augmentation in 1777. On appeal to the

(*a*) 1716, Connell, Tithes, vol. i. p. 396.

(*b*) 1720, *ibid.* p. 398.

(*c*) *Ibid.* pp. 398, 399, and 400.

House of Lords, however, this judgment was reversed, and the cause was remitted to be disposed of on its merits; and the minister ultimately obtained an augmentation (*a*). To a similar effect are the judgment of reversal in the case of Tingwall (*b*), and the judgment of the Teind Court in the case of Prestonkirk (*c*), affirmed on appeal. These three last-mentioned cases decided that the Teind Court was entitled to augment stipends already modified by a decree pronounced either before or after the Union, and also to re-augment stipends augmented either before or after that date, when the amount of stipend was inadequate, irrespective of the date of the decree of modification, or last decree of augmentation. Shortly prior to the Act 48 Geo. III. c. 138, the minister of Stow (*d*) seems to have sued for and obtained two separate augmentations within the short period of eight years. This statute, however, as explained below, extended the period within which an augmentation or re-augmentation of stipend cannot be applied for to twenty years.

SECTION XIII.—*Stipend, what and whence derived?*

33. The original meaning of the word stipend is nearly synonymous with wages or salary (*e*). Accordingly, in one clause of the Act 1696, c. 26, the term is used as designative of the salary of the parish schoolmaster. In its more technical and now generally received acceptation, it expresses the professional income of the parish minister, and denotes that portion of the endowment of the cure, styled the spirituality of the benefice, which is payable in money to the incumbent thereof (*f*).

(*a*) *Milligan v. Wedderburn*, M. 14,816, 1779, 2 Paton, 621; *Connell, Tithes*, vol. i. p. 403.

(*b*) *Minister v. Heritors of Tingwall*, 1786, M. 14,817, as reversed 1789, 3 Paton, 140.

(*c*) *Minister of Prestonkirk v. Earl of Wemyss*, 1808, M. *Stipend*, Appx. 6; *affd.* 5 Paton, 210. The opinions of the Judges of the Court of Session

in this case are printed in the Appendix to vol. ii. of *Connell on Tithes*, p. 313.

(*d*) *Dawson v. Pringle*, 15th June 1808, F.C.

(*e*) *Per curiam* in *Gloag v. M'Intosh*, 1753, *Elchies, Stipend*, 8, Notes,

(*f*) Stipends are sometimes also termed "benefices of kirks."—See 1661, c. 52.

CHAP. VIII.

Sources of stipend.

34. The stipend in all parishes *quoad omnia*, with a few exceptions in the case of purely burghal parishes, is derived from teinds. In ordinary statutory parishes *quoad sacra* the stipend is derived from the revenue of an endowment provided from voluntary sources when the parish was erected. In the case of Parliamentary churches, whether erected as parish churches *quoad sacra* or not, the stipend comes from a grant from Exchequer. In certain burghal parishes the stipend is provided by the Town-Council under contract or prescriptive usage, with sometimes a right of reimbursement from seat rents. In a few cases the stipend comes from special sources, and in some cases there are supplements from ancient endowments or mortifications. Certain small stipends are augmented by a grant from Exchequer. These sources of stipend will be explained in order.

SECTION XIV.—*Stipend from Teinds: What Ministers entitled to Stipend?*

General rule on the subject.

35. Save in exceptional cases, the provisions of the Act 1707, c. 9, and prior relative statutes *quoad* the modification of stipends, are applicable to all old parishes *quoad omnia*. Hence the general rule obtains that the incumbent of each parish *quoad omnia*, the charge being single, and the first minister of each such parish, the charge being collegiate, is entitled to a stipend out of the teinds of the parish. The language of these statutes is susceptible of the construction that to modify more than a single stipend out of the teinds of any one parish is not authorised; and it may be doubted whether, but for the Act 1693, c. 25, this construction would not have been universally adopted and applied.

Modification of stipend to a second minister.

36. By the Act 1690, c. 23, the right of presentation was taken from patrons, and in lieu thereof, teinds not heritably disposed were declared to belong to them under burden of the ministers' stipends. By the Act 1693, c. 25, this benefit was "extended to the patrons of all parsonages and other

“benefices without exception,” under the like burden, “and further, with the burden of provisions to *two ministers* in “one parish if the Commission shall think fit” (*a*). It does not appear that prior to the Union the Parliamentary Commissioners ever granted an unqualified modification of stipend out of the teinds of a parish to a second minister (*b*). Immediately after the Union, however, the case of Falkirk occurred (*c*); in which the Teind Court refused to modify a stipend to the second minister of that parish, apparently on the ground that the same was not a parsonage, and so fell not within the scope of the Act 1693, c. 25. On the other hand, in the case of Elgin in 1714 (*d*), although on what ground does not appear, the Court modified a stipend to the second minister. In 1716 the Court modified a stipend to each of the two ministers of Old Machar (*e*), apparently in respect of former usage. On a somewhat similar principle a stipend was modified to the second minister of Culross in 1722 (*f*). In *Marshall v. Town of Kirkcaldy*, in 1738, the Court refused an augmentation at the instance of the second minister, on the ground apparently that he was not established by authority of the Parliamentary Commissioners, but was merely a helper appointed by private agreement, whose stipend was due under a voluntary contract (*g*). On the other hand, and in respect that his original establishment, though under voluntary contribution, was by authority of the Commission in 1647 and 1650, the Court found the second minister of Dunfermline entitled to sue for an augmentation (*h*). In the very special circumstances of

Cases illustrative of the practice.

(*a*) “The reason of giving the Commissioners the power of modification to two ministers in the special case of parsonages, seems to have been that in consequence of the appropriation of teinds in benefices of this description from the minister to the patron, there would be no hardship in imposing upon the patron the burden of supporting two ministers where the circumstances of the parish required it.”—Connell Par. 120.

(*b*) In *Fairnie v. Heritors of Dunfermline*, *infra*, note (*h*), the decree of modification in 1650 was evidently of a qualified character.

(*c*) 1707, Connell Par. p. 121.

(*d*) *Ibid.* 129.

(*e*) *Ibid.* 131.

(*f*) *Ibid.* 133.

(*g*) *Ibid.* 136, M. 14,795, and Elchies, *Stipend*, 1.

(*h*) *Fairnie v. Heritors of Dunfermline*, 1749, M. 14,796, Elchies, *Stipend*, 6, and Connell Par. p. 141.

CHAP. VIII.

the case, the Court modified a stipend to the second minister of Inverary in 1792 (*a*). The general rule, however, was applied in the case of St. Andrews in 1822, where the Court refused to grant an augmentation to the second minister (*b*).

Inference
deducible from
cases in regard
to second
minister.

37. The inference deducible from the cases now mentioned (*c*) seems to be that a second minister cannot obtain a modification or augmentation of stipend unless—1st, by special agreement, express or implied, on the part of the heritors, the stipend of the second minister is payable out of teinds; or 2nd, that his appointment *qua* parish minister has been made by the Parliamentary Commissioners or the Teind Court.

SECTION XV.—*Right to Stipend from Teind, what, and by whom due?*

Stipend
debitum
fructuum.

38. Stipend payable out of teinds is *debitum decimarum*. It is due out of, and forms a paramount claim upon, teind (*d*); and like teind, whence it is derived, stipend is a *debitum fructuum*, not *fundi*. On this principle it was held that the life-renter of the estate, as intromitter with its fruits, and not the fiar, was liable for stipend (*e*).

Owners or
intromitters
with teind
liable there-
for.

39. The titular of the teinds within the parish and those in his right as tacksmen, and intromitters generally with the teinds, including persons holding heritable rights thereto, are all liable for his stipend to the minister who has the first and highest claim therefor on the teind fund, *i.e.* the teinds of the parish (*f*). The order in which the several holders of this fund, as in a question *inter se*, are liable to contribute toward liquidation of this preferable claim depends on the nature of

(*a*) Connell Par. p. 146.

(*b*) Buist *v.* Cheape, 1822, S. T. 23.

(*c*) See also per Lord President Inglis (then Lord Justice-Clerk) in *Magistrates of Haddington v. Kennedy*, 1859, 21 D. at p. 734.

(*d*) Stair, ii. 8, 21; Cathcart *v.* Paton, 1698, M. 10,524; Johnston *v.* Heritors of St. Cuthbert's, 1802, M. 14,834. Per Lord Justice-Clerk

Hope and Lord Robertson in *Minister v. Heritors of Prestonkirk*, Feb. 1808, see Connell, *Tithes*, Appx. pp. 318 and 334. Per Lord Ordinary Newton in *Masters of Dundee v. Wedderburn*, 1830, 8 S. at p. 549.

(*e*) Menzies *v.* Glenurchy, 1663, M. 14 788.

(*f*) See cases just cited.

their respective teind rights; and this order of liability it is the purpose and province of a decree of locality to settle.

CHAP. VIII.

SECTION XVI.—*Modification of Stipend and Locality.*

40. The term "modify," as used in various of the old statutes already mentioned, means to fix or determine the amount of stipend due to the incumbent, and how payable, *i.e.* in victual or money. Under the decree of modification he might demand payment of the stipend from any one of the heritors or intromitters with the teinds within the parish, to the extent of the teinds drawn by him, reserving to the party making payment a right of relief against the other heritors for the proportion of stipend due by them (*a*). As, however, it was reckoned an oppressive proceeding on the minister's part to charge one heritor for payment of the whole stipend, or of a larger proportion of it than that for which he might be ultimately found liable, the Court, on modifying the stipend, sometimes also divided or proportioned it, *i.e.* appointed it to be paid by or allocated on the different heritors and possessors of lands (*b*) within the parish in certain specified proportions (*c*).

Meaning and effect of a modification.

Apportionment of stipend.

41. In some instances the stipend was paid to the minister according to a scheme of allotment voluntarily arranged by the heritors themselves. Use of payment of stipend in this way, however, although extending over a period of above

Voluntary and judicial localities.

(*a*) *Morton v. Scot*, 1625, M. 14,784; *Anderson v. Urquhart*, 1805, M. 14,836, and per Lord President Campbell in *Dawson v. Pringle*, 1808, M. *Annual Rent*, Appx. 5; *Balfour v. Ker*, 1623, M. 14,784; *Kirk v. Gilchrist*, 1629, M. 14,786; *Vernor v. Allan*, 1662, M. 14,788; *Hutcheson v. Earl of Cassillis*, 1664, M. 14,788; *Keith v. Gray*, 1633, M. 14,786; *Coupar v. Earl of Roxburgh*, 1696, M. 12,411 and 14,791; and see *Ersk. Inst.* ii. 10, 48.

(*b*) See *Kirk v. Gilchrist*, *supra*, and *Spotiswoode, Kirkmen*, p. 191.

Here a suspension was brought by a tenant of a charge for stipend by the minister of Glendovan under a decree of locality, on the ground that the complainer had paid his landlord the rent due for the occupancy of his "room" prior to the date of the charge. The Court, however, found the letters orderly proceeded, in respect that the minister might make either the heritor or the possessor of the "room" liable in payment of the teind duty.

(*c*) *Connell, Tithes*, vol. i. p. 462 *et seq.*

CHAP. VIII.

forty years, did not bar the incumbent from demanding and obtaining a judicial locality (*a*). Prior to the Union localities were frequently proposed by the titular and (after 1690, c. 23) by the patron (*b*), or pronounced by the Commission on the application of the minister (*c*). The object of these localities was to apportion on the lands of the several heritors in the parish the amount of the stipend payable out of the teinds; and their effect was to liquidate and limit to a corresponding extent the amount of stipend due by these heritors respectively to the minister (*d*).

Practice as to
localities after
1707.

42. When the Act 1707, c. 9, came into operation, the Teind Court adopted the course of remitting to the Lord Ordinary to prepare a scheme of locality (*e*), while in some instances the minister insisted in a locality as a separate process (*f*). Toward the latter end of the eighteenth century the expedient was introduced of appointing in the course of the augmentation a neutral party, styled the common agent, to attend to the interests of the holders of the teind fund, in allocating upon them respectively the amount of stipend modified (*g*). Although not a matter of statutory requirement, the appointment of a common agent is assumed as a necessary step in every process of augmentation and modification by the Act of Sederunt 5th July 1809; and such appointment is now invariably made, save in cases where the whole teinds on which increased stipend can be allocated are exclusively held by an individual or by one or two individuals, who can readily adjust the matter among themselves.

Appointment
of a common
agent.

(*a*) *Blantyre v. Currie* (H.L.), 1714, Robertson, 88, not reported in Court of Session.

(*b*) See *Duke of Queensberry v. Carruthers*, 1749, M. 15,662; *Dunbar v. Gordon*, 1750, M. 15,663.

(*c*) See *Connell, Tithes*, vol. i. ch. 3; also *Coupar v. Earl of Roxburgh*, *supra*, M. 14,791.

(*d*) *Ersk.* ii. 10, 47; *Bankt.* 2, 8, 168; *Bell's Prin.* 1163. See *Hutcheson v. Earl of Cassillis*, 1664, M.

14,788; *Campbell v. Murray*, 1726, M. 14,792; *Minister of Eskdalemuir v. Scott*, 1742, M. 14,795.

(*e*) *Connell, Tithes* vol. i. p. 473.

(*f*) *Ibid.* p. 476.

(*g*) *Ibid.* p. 477. See also *Earl of Mansfield v. Duke of Queensberry*, 1800, M. *Teinds*, Appx. 9; and *Teind Clerk's Report in Weatherstone v. Marquis of Tweeddale*, 1833, 12 S. at p. 10, foot.

SECTION XVII.—*Stipends formerly modified in Victual or Money.* CHAP. VIII.

43. In valuing teinds held jointly with the stock in terms of the Acts 1633, cc. 17 and 19, the valuation was made sometimes in grain, sometimes in money, and sometimes partly in both, according to the form in which the rent itself was paid. Prior to the Union, when a stipend was modified it was usually modified in victual or money according as the teinds were valued in victual or money; and if in victual, it was ordinarily made payable in the kind of grain most commonly grown in the parish.

44. The practice in the matter, however, was not uniform until the beginning of the nineteenth century. Thus, while in the case of Strathdon (*a*), in 1793, the rule was applied that when teinds were valued in money an augmentation could not be modified in grain, in the important case of Lamington (*b*), in 1798, an opposite principle was adopted—an augmentation being there given in grain, although the teinds of the parish were valued in money. A similar course was adopted in the cases of Skene (*c*) and Cummertrees (*d*).

45. When the modification was in victual—whereby the minister had right to the *ipsum corpus* of so much grain—he was entitled to obtain delivery of the first quantity of the year's crop between Yule and Candlemas. In the case of Duns (*e*), where the heritor failed to give delivery on Candlemas day, he was found liable to the minister in the average price betwixt the fiars of Candlemas and Lammas preceding. In the case of Maybole (*f*), where the victual stipend was unpaid for some years, the Court found the minister entitled to the market prices of the grain at Candlemas of the different years, which was much higher than the fiars prices. When

(*a*) Gordon v. Earl of Fife, 1793, M. 14,821.

(*b*) Mitchell v. Douglas, 1798, M. 14,827.

(*c*) Skene v. Minister of Skene, 1791, M. 14,831.

(*d*) Earl of Mansfield v. Minister of Cummertrees, 1798, M. 14,832.

(*e*) Gray v. L. of Cockburn, 1675, 2 Br. Supp. 186.

(*f*) Wright v. Binning, 1801, M. 14,833.

Former practice in valuations and modifications not uniform.

Case of Strathdon.

Lamington.

Result of modification in victual.

CHAP. VIII.

the stipend was modified in money, it was usually made payable at the terms of Whitsunday and Martinmas yearly. As explained below, stipends must now, except in certain special circumstances, be modified in grain or victual.

SECTION XVIII.—*Stipends from sources other than Teinds.*

Parliamentary
churches under
4 Geo. IV. c.
79, and 5 Geo.
IV. c. 90.

46. Under the Acts cited on the margin, provision was made for the erection and endowment of forty chapels in the Highlands and Islands. On completion of the church and dwelling-house(*a*) for the minister under these Acts, the Commissioners thereby appointed were authorised to fix a stipend for the incumbent not exceeding £120 (including the cost of communion elements), payable at Whitsunday and Michaelmas yearly, from the first of these terms immediately preceding the date of his admission by the Presbytery. The rights and interests of ministers appointed to such additional churches in the case of death, removal, or resignation, and the rights and interests of their successors in regard to stipend, are regulated by the terms of Whitsunday and Michaelmas, in the same manner as the stipends of parish clergymen generally by the law of Scotland. The stipends of ministers under the above statutes are entirely derived from the income of parliamentary funds.

Stipends in
parishes
erected under
7 and 8 Vict.
c. 44.

47. The stipends of ministers of parishes *quoad sacra*, erected out of what formerly were parliamentary districts under section 14 of the statute 7 and 8 Vict. c. 44, are secured under the provisions of the two Acts mentioned in the immediately preceding paragraph; while those provided out of the teinds to ministers of parishes *quoad omnia*, erected under sections 2–8 of the 7 and 8 Vict. c. 44, are truly modified under the provisions of the Act 1707, c. 9, and this class of stipend has been already fully dealt with above.

Stipend in
ordinary *quoad
sacra* parishes.

48. The endowment or stipend of ministers of parishes *quoad sacra*, other than those created by the erection of

(*a*) As to the repair of these fabrics, see *Macdougall v. Duke of Portland*, 1892, 20 R. 105.

parliamentary churches, is fixed by the 7 and 8 Vict. c. 44, at not less than £100 per annum, or seven chalders of oatmeal, calculated at the highest fiars prices of the county, exclusive of a sum for communion elements, where a suitable manse and offices are provided; and at not less than £120 per annum, or eight and a quarter chalders of oatmeal, calculated at the highest fiars prices as aforesaid, when no manse is provided. This stipend is to be permanently secured to the ministers of such parishes in all time coming to the satisfaction of the Teind Court. The statute does not specify whence such endowments are derivable; but they have, in most instances, been provided through the agency of the Endowment Scheme of the Church of Scotland. By section 16 of the 7 and 8 Vict. c. 44, it is declared that none of the provisions contained in either of the Small Stipend Acts (*a*) are applicable to any new parishes erected under the said statute, although the stipend of the minister of any such parish be less than £150 per annum. Exempted
from Small
Stipend Acts.

49. Burghal areas, in so far as occupied by houses, were of small extent three centuries ago, and, with the possible exception of the City Parish of Edinburgh, there was probably no purely urban parish in 1600. All other parishes at that time probably contained a considerable landward district, the teinds of which were liable for the support of the minister. Burghal
churches. The writer knows of no other pre-Reformation parish church the minister of which does not draw a stipend from teinds. As the more important towns increased in population and area, however, further church accommodation became necessary, and churches were founded and supported by the municipalities. It is probably vain now to inquire whether this action on the part of the municipal authorities is to be regarded as voluntary, or, as was indicated by some of the Judges in the case of *Clapperton* (*b*), as a necessary compliance with the public law, which, in days when Dissent was not

(*a*) See *infra*, sects. 52 and 53.

(*b*) *Infra*, p. 298, note (*a*).

CHAP. VIII.

recognised and Voluntaryism was not understood, was regarded as imposing upon the municipality, as representing the community, the duty of making provision for the supply of religious ordinances to the whole population. In any case, when a church has been so founded, and received and recognised as a parish church, the obligation of the municipality to maintain it and to support the minister is undoubted. In such cases the stipends are payable out of the common good of the burgh, and there is a right of relief or recoupment by levying seat rents. Whether, if the common good is insufficient to meet the obligations, the magistrates may impose an assessment upon the heritors or owners of heritable property in the burghal parish has never been decided (*a*). The question of augmentations in the case of burghal churches is treated below (para. 85).

Annuity tax in
Edinburgh and
Montrose.

50. Formerly in the city of Edinburgh and in the burgh of Montrose the stipends of the city clergy were provided by a tax upon the inhabitants levied by the magistrates. This tax was commuted and abolished by the Act 23 and 24 Vict. c. 50, as amended by 33 and 34 Vict. c. 87, and the stipends of these clergy are now, under special statutory arrangement, provided partly out of the revenue of a capitalised fund and partly out of seat rents.

Private mortifi-
cations.

51. In exceptional circumstances the stipend of a parish minister may be derived from a private mortification or under a special contract. In a good many cases there is a supplementary provision from the former source.

52. In virtue of the 50 Geo. III. c. 84, the clergymen of

(*a*) The leading cases upon the subject-matter of this paragraph are cited together as references to a single case upon a special point might be misleading, and it is necessary to take a conjunct view of the not very numerous body of authorities.—Magistrates of Stirling *v.* Gordon, 1837, 15 S. 657; Clapperton *v.* Magistrates of Edinburgh, 1840, 2 D. 1385; Magistrates of Kilmarnock *v.* Aitken, 1849,

11 D. 1089; Caesar *v.* Magistrates of Dundee, 1848, 20 D. 859; Magistrates of Greenock *v.* Peters, 1892, 19 R. 643, *affd.* 20 R. (H.L.) 44; Rainie *v.* Magistrates of Newtown, Ayr, 1855, 22 R. 633, 24 R. 606; Thomson *v.* Magistrates of Greenock, 1896, 23 R. 405; see also McNeil *v.* Robertson, 1836, 14 S. 849, per Lord Moncreiff.

parishes the stipends of which did not extend in annual amount of value to £150 sterling, and which under the law in force in June 1810 could not be augmented to that extent—by reason either (1) of the teinds being exhausted, or for other want of funds whence such augmentation could be made, or (2) of the amount of unexhausted teind being so small as to render it inexpedient to sue for an augmentation—were entitled to have the deficiency made up out and to the extent of a sum of £10,000 of public money, annually raised for this purpose. The amount allocated out of this fund to each such clergyman was payable to him under a warrant by the Barons of Exchequer on H.M. Receiver-General in Scotland at the terms of Whitsunday and Michaelmas yearly. The rights and interests of ministers in their augmented stipends under the Act on their decease or removal, and those of their successors in such stipends, were regulated by the two terms just mentioned in the same way as other stipends, as afterwards explained (*a*). When the Teind Court was of opinion that the unexhausted teinds of the parish should be exhausted before an augmented stipend under the Act was granted, it was made competent for the minister to raise a process of augmentation and modification, under which the whole unexhausted teinds should be awarded to him, notwithstanding any provision to the contrary in the 48 Geo. III. c. 138.

53. An additional parliamentary grant of £2000 having, subsequently to 1810, been made, the Act 5 Geo. IV. c. 72, was passed, which, besides securing ministers in the full allowances granted to them under the previous statute, made an additional allowance to such of them as, being without, could not according to law be provided with a manse and glebe. By the Act in question, parish ministers so circumstanced, whose stipends were under the amount or value of £200, were entitled to have the deficiency made up in such a way that

CHAP. VIII.

Exchequer
grants under
Small Stipends
Act, 50 Geo.
III. c. 84.

Addition to
Exchequer
grant under
5 Geo. IV. c.
72.

(*a*) See *post*, para. 59.

CHAP. VIII.

an allowance might be granted which should secure the minister in a stipend not exceeding £200 when there was neither a manse nor glebe, and not exceeding £180 when there was a manse but no glebe, or *vice versa*.

Construction
of the Act.

54. In construing these provisions of the statute it has been held that an allowance of £23 annually to the minister as manse and glebe rent is not equivalent to the possession by him of a manse and glebe in the sense of the Act (*a*); and that the possession by the clergyman of 30 acres of land, disposed and mortified for behoof of the parochial incumbent, though not formally designated as such, amounts to a glebe within the meaning of the Act (*b*). The statutory allowance in question, as will be observed, is only made in supplement of an actual or assumed deficiency in the teinds of the parish to afford a competent stipend. Hence the stipends of those ministers to whom such allowances are granted are derived partly from teinds and partly from parliamentary funds.

SECTION XIX.—*When Minister's right to Stipend emerges.*

Right to stipend emerges on induction.

55. As a minister's right to stipend results from the possession by him of the status of incumbent, this right on his part does not emerge until the pastoral relationship with the cure is legally completed by collation to the benefice. It is not enough that he be appointed to the living by the congregation, or that without legal appointment he has been instituted to the spiritual charge by the Presbytery. He must be effectually appointed to the living, and formally admitted or inducted into the charge (*c*).

(*a*) Procurator for Church *v.* Officers of State (Gorbals Case), 1828, S. T. 148.
(*b*) Wilson *v.* Officers of State, 1826, S. T. 88.

(*c*) See M'Kenzie *v.* Parishioners of Sclait, 1627, M. 14,785; College of Glasgow *v.* Parishioners of Jedburgh, 1676, M. 14,790; Cochran *v.* Stoddart, 1751, M. 9951; and per Lord Corehouse in the Auchterarder

case, 16 S. 769, who says the presentee "can have no right to the fruits of the benefice until he shall be inducted." In one case, however, this doctrine seems to have been departed from, and in other instances to have been practically evaded,—M'Gill *v.* Earl of Cassillis, 1664, 1 Br. Supp. 501, and Crawford *v.* Beaton, 1673, *ibid.* 688; see also

56. In accordance with this doctrine a presentation by one who it was subsequently found was not the patron, although followed by induction by the Presbytery, conferred on the presentee no right to stipend (*a*). Equally so where the induction was without a presentation or was granted contrary to the wish of the patron (*b*). For in all these cases, although the title to the spiritual office might have been good, there was an absence of a valid title to the civil fruits of the benefice.

CHAP. VIII.
Cases illustrative.

57. On the other hand, the minister's right to stipend ceases when his pastoral relationship with the cure is terminated by his deposition (*c*), resignation, translation, or death. Mere non-residence in the parish, however, or failure to perform the duties of his charge, does not terminate his right to stipend (*d*). Unless to the qualified effect introduced by the Act 26 and 27 Vict. c. 47, section 3, even the suspension of a minister has not this effect (*e*). In order to be operative in the way now referred to it must be followed by a formal and final sentence of deposition (*f*).

Right to stipend ceases on emergency of vacancy.

58. While a minister's right to the spirituality of his benefice may be said to emerge immediately on his formal induction into the cure, proceeding on a valid appointment, his beneficial enjoyment of the right does not, as in the case of the right to the temporality of the benefice, at once accrue to him. This arises partly from the difference in the nature of these two rights, and partly from the statutory claim to

Payment of stipend.

M'Queen v. Marquis of Douglas, 1670, M. 15,888; *Lawtie v. Galbraith*, 1670, M. 15,889; *Blair v. Skeen*, 1683, M. 15,899.

(*a*) *Dick v. Carmichael*, 1752, M. 9954, as reversed under title *Lord Advocate v. Dick*, not reported in House of Lords.—See Kinnear's Dig. p. 252, No. 2.

(*b*) See *Moncrieff v. Maxton*, 1735, M. 9909; *Cochran v. Stoddart*, 1751, M. 9951.

(*c*) *College of Aberdeen v. Aboyne*, 1679, M. 14,791. In *Home v. Gal-*

braith, 1685, M. 15,900, a minister, who was turned out of the cure in January for not taking the test, was found not entitled to the stipend due at Whitsunday thereafter.

(*d*) *Coupar v. Earl of Roxburgh*, 1697, M. 12,411, Second Report.

(*e*) *Campbell v. M'Donald*, 1741, M. 14,795.

(*f*) *Livingstone v. Grant*, 1850, 13 D. 394; *affd.* 1860, 32 Jur. 514. See also *Dalrymple v. Gordon*, 1765, M. 15,915, and *Dickson v. Heritors of Newlands*, 1768, M. 7464.

CHAP. VIII.

ann in favour of the "executors" of the predeceasing incumbent. The manse and glebe are subjects which have a permanent existence and can at any moment be apprehended and possessed. The fruits of the harvest, however, from which stipend is or is assumed to be derived (*a*), have only a periodically recurring and a short-lived existence.

Dependent on
Whitsunday
and Michael-
mas.

59. By the term of Whitsunday (15th May) the crops to be reaped that year are presumed to be sown; and by the term of Michaelmas (29th September), the crops sown that year are presumed to be separated from the ground or reaped. The minister being recognised as directly interested in these two operations, his right to stipend is regulated by these two terms as follows—viz. 1st, If the minister's interest in the benefice ceases before the term of Whitsunday, he is entitled to no part of the stipend due for that year's crop (*b*); 2nd, If the minister's interest ceases between the terms of Whitsunday and Michaelmas, he is entitled to one-half of the stipend due for that year's crop (*c*); and 3rd, If the minister's interest does not cease until after both terms are come and bygone, he is entitled to the whole stipend due for that year's crop (*d*). While the right of ministers to stipend is regulated by these two terms, it must still be observed that as the stipend periodically accruing is derived from the year's crop when reaped, so the year's stipend does not become exigible, because theoretically it has no existence, until the arrival of the latter term. Unless where it is otherwise specially provided, stipends from sources other than teinds vest according to the same dates as stipends from teinds.

Former rights
of churchmen.

60. Anciently a churchman had right to the whole fruits of his benefice if he survived January, on the principle *in beneficiis annus inceptus habetur pro completo*; and if he sur-

(a) See Reports of Sheils *v.* Town of St. Andrews, 1709, M. 466.

(b) White *v.* Parishioners of Symington, 1671, M. 15,893.

(c) Archbishop of Glasgow *v.* late Archbishop, 1675, M. 15,897;

College of Aberdeen *v.* Heritors of Rathen, 1676, M. 15,897.

(d) See Stair, ii. 8, 33, and Ersk. ii. 10, 54, and the terms of the Act 1672, c. 13.

vived Michaelmas to these fruits *proprio jure*, along with those for the next half-year *jure annatæ* (a). But in conformity with the provisions of the Act 1672, c. 13, the right of ministers to stipend is now regulated in the way just stated.

CHAP. VIII.

SECTION XX.—*Nature of Ann, and when due?*

61. A provision is, in certain cases, due to the “executors” of the minister after his own right to stipend has terminated. This provision, known as Ann, Annat, or Annatine, is traceable to an ecclesiastical origin, although the nature of the right implied by the canon law, under the corresponding term *Annatæ*, bears but a slight resemblance thereto (b).

62. By the Acts 1546, c. 4, and 1571, c. 41, it was declared that besides the presentation, provision and collation of the benefices of kirkmen who, being in the service of the reigning sovereign for the time, should be slain in the wars therein alluded to or die from injuries received in battle, the profits of their benefices, and “the fruites speciallie on the gronde, “with the annat theirafter,” should pertain to them and their executors, “alsweil abbottes, priores, as all uther kirkmen.” These Acts appear to have applied to beneficed clergymen only (c). The provision of ann came subsequently to be conferred on the “executors” of deceasing churchmen generally according to a practice which the Reformed Church adopted from the example of Germany; but its precise amount does not seem to have been determinately fixed by our practice (d) until the date of the Act 1672, c. 13.

Ann of ecclesiastical origin.

Provisions of 1546, c. 4, and 1571, c. 41.

(a) See Mack. Obs. p. 149. Also *per curiam* in *Turner v. Borthwick*, 1671, 1 Br. Supp. 639; and *Birnie v. Lockhart*, 1675, *ibid.* p. 741.

(b) See Ersk. iii. 10, § 65 *et seq.* and Van-Espen, Jus Eccles. Univer. pt. ii. sec. 3, tit. 7, cap. 4, § 13 *et seq.*

(c) See *Macquewan v. Pearson*, 1670, 1 Br. Supp. 604.

(d) See *per Lord President in Latta v. Edinburgh Ecclesiastical*

Commissioners, 1877, 5 R. 266; compare the cases of *Smeiton v. Relict of Minister of St. Bothans*, 1629, M. 461; *Wemyss v. Parishioners of Lasswade*, 1662, M. 462; *Minister v. Parishioners of Leswald*, 1662, M. 472; and *Turner v. Borthwick*, 1671, 1 Br. Supp. 639, with *Ker v. Parishioners of Cardine*, 1661, M. 461.

CHAP. VIII.

Act 1672, c.
13.

63. For securing the ann due to the "executors" of deceased bishops, beneficed persons, and stipendiary ministers, it was provided by this Act, "that in all cases hereafter, the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency; which is now settled to be thus, viz.—if the incumbent survive Whitsunday there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmas, he shall have right to that whole year's rent for his incumbency; and for his ann shall have the half-year's rent of the following year, and that the executors shall have right hereto, without necessity or expenses of a confirmation." This statute is not, as might be supposed from its terms, declaratory of what formerly was the law, but it embodies a change of the law (*a*) applicable alike to the minister's right to stipend and his "executors'" right to ann.

Ann belongs
not to minister
but to his
"executors."

64. Although the expression "his ann," as used in the Act 1672, c. 13, might suggest the inference that the right to ann pertained to the minister, such is not truly the case (*b*). The provision in question is by this Act intended for the special benefit of and exclusively belongs to the minister's "executors;" and in this respect stands in contrast to his right to stipend. Stipend is payable to the minister in consideration of his labours as incumbent; and the rules of law already adverted to determine what proportion, if any, of the stipend vests in the minister, according to the period of the year at which his connection with the benefice terminates. The proportion of stipend which so vests in the minister thereby becomes his property and as such may be assigned or tested on by him. On the other hand, the ann is a legal

Right to ann
and to stipend
contrasted.

(*a*) *Per curiam* in *Birnie v. Lockhart*, 1675, 1 Br. Supp. 741; *Latta v. Edinburgh Ecclesiastical Commissioners* 1877, 5 R. 266.

(*b*) A different rule seems to have

obtained before the Act 1672,—see *Henderson's Bairs v. Debtors*, 1623, *Durie*, p. 89, and *M. 472*; and *Bairs of B. of Galloway v. Couper*, 1628, *M. 470*.

gratuity belonging *proprio jure* to the defunct minister's "executors." CHAP. VIII.

65. The right to ann does not arise on the demission of the cure by the incumbent (*a*). It emerges only on his death. Consequently it has never come to be *in bonis* of the deceased minister, and so cannot be assigned or bequeathed by him or attached for his debts (*b*).

When right to ann arises.

66. The persons to whom ann is due are referred to in the Act 1672, c. 13, as the "executors" of the deceased minister. These are in the first instance his widow and children, and failing them, his next of kin. When the minister leaves a relict and a child or children then the ann divides into two equal shares, whereof one share belongs to the widow and the other share to the child or to the children as a class and divisible among them *per capita* (*c*). When the deceased minister leaves a relict but no children, the ann is divided equally between the relict and the next of kin of the deceased (*d*). When the deceased minister leaves neither relict nor children the ann is divided equally among his next of kin (*e*). Ann is due whether the stipend is paid out of tithes or not, and vests in the defunct's "executors" without confirmation (*f*).

"Executors" to whom ann is due.

67. Prior to the Act 1672, c. 13, the provision of ann extended in some instances to a whole year's stipend subsequent to the date when the defunct ceased to have right to stipend *proprio jure* (*g*). The statute in question, however,

Amount of ann.

(*a*) Archbishop of Glasgow *v.* late Archbishop, 1675, M. 15,897.

M. 464; Spence *v.* Craig, 1679, M. 465.

(*b*) Alexander *v.* Cunningham, 1686, M. 470; Donaldson *v.* Brown, 1694, M. 471; see Dow *v.* Imrie, 1887, 14 R. 928.

(*c*) Colvill *v.* Balmerino, 1665, M. 466.

(*c*) M'Dermets *v.* Montgomery, 1747, M. 464. See on this point Ersk. ii. 10, 67, with Ivory's note, and authorities there cited, all of whom, with the exception of Stair, ii. 8, 34, appear to concur in the rule adopted in M'Dermets' case.

(*f*) Hutchison *v.* Magistrates of Edinburgh, 1747, M. 467; Wemyss *v.* Parishioners of Lasswade, 1662, M. 462; Ker *v.* Parishioners of Morumside, 1673, M. 471.

(*d*) Scrimgeour *v.* Murray, 1663,

(*g*) Smeiton *v.* Relict of Minister of St. Bothans, 1629, M. 461; Wemyss *v.* Parishioners of Lasswade, *supra*, M. 462; Turner *v.* Borthwick, 1671, 1 Br. Supp. 639; Colvill *v.* Balmerino, 1665, M. 464 and 466.

CHAP. VIII.

declared the extent of this provision to be "an half-year's "rent of the benefice or stipend over and above what is due "to the defunct for his incumbency." Hence, when the minister's incumbency terminates between Whitsunday and Michaelmas, his "executors" have right to the second half of that year's stipend as ann; and when the minister's incumbency terminates between Michaelmas and Whitsunday, his executors have right to the first half of the next year's stipend as ann. The claim of the minister's representatives for ann is preferable to that of an assistant and successor, either to the whole or to a part of the stipend for the half-year in respect of which ann is due (*a*). As already mentioned, this provision becomes due only in the case where the minister is the incumbent at the time of his death. If before that event he resign his charge or be deposed, his "executors" cannot claim the provision. A mere sentence of suspension, however, as it does not terminate his incumbency, will not exclude their right to ann (*b*). Payment of ann is not affected by the Apportionment Act of 1870 (*c*).

When due.

Right to ann
under Small
Stipends Acts.

68. By section 16 of 50 Geo. III. c. 84, it is provided that the personal representatives of a deceasing minister whose stipend has been augmented under this Act, and the personal representatives of his successors, shall be entitled to draw one half-yearly moiety of the statutory allowance in name of ann, over and above the stipend due, as in the case of the other stipends of the clergy of Scotland. In virtue of the enactment contained in section 6 of the subsequent statute, 5 Geo. IV. c. 72, a similar rule appears to apply as to the right to ann in connection with augmented stipends granted under the authority of its provisions.

Ann under 5
Geo. IV. c. 90.

69. By section 24 of 5 Geo. IV. c. 90, it is provided that the widow or next of kin of the minister of a parliamentary

(*a*) See *Dow v Imrie*, 1887, 14 R. 918.

(*b*) *Relict of Shiels v. Parishioners of West Calder*, 1670, M. 10,437.

(*c*) *Latta v. Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266.

church is entitled to draw a half-yearly moiety of stipend under that Act, in name of ann, above the proportion of stipend which may be due to the minister deceasing, payable in the manner directed for the payment of the minister's stipend, upon a receipt by the person or persons entitled to such ann without the necessity of confirmation or a formal title being made up.

SECTION XXI.—*Vacant Stipend, what and when arising?*

70. During a vacancy in the ministry of a parish the stipend which would have been payable to the clergyman of the parish, had there been one, is termed "vacant stipend." The usual occasions on which a vacancy is created are on the deposition, translation, resignation, or death of the incumbent. His removal, however, by death or otherwise does not create a vacancy in the case where an assistant and successor has been appointed to him. In such a case, and immediately on the removal of the principal incumbent, the assistant minister becomes *ipso facto* incumbent without induction of new, his former election and induction operating as an effectual collation (a).

When vacancy occurs.

71. By the Act 1592, c. 117, it was provided that if the Presbytery refuse to admit a qualified presentee it should be lawful for the patron to retain the whole fruits of the benefice. The Act 1644, c. 20, ordained that stipends arising during a vacancy of churches generally were to be applied by the patrons with consent of the Presbytery or by the Presbytery itself. Vacant stipends of Highland churches were to be applied in training youths "that have the Irish tongue" in schools and colleges allendarly, and to no other pious use. By the Act 1661, c. 52, it was provided that the stipends of kirks vacant by the decease, deposition, suspension, translation of the minister, or otherwise, should be employed in pious

To whom vacant stipend belouged.

(a) See *dicta* by the Judges in *Clark v. Stirling*, 1841, 3 D. 722.

CHAP. VIII.

uses, among which are specially mentioned the maintenance and relief of those persons in the ministry and universities, and their widows and children, who for their loyalty had been deprived of or suspended from their offices. The Act 1663, c. 21, declared that free manses are to be upholden by the incumbent ministers during their possession, and by the heritors during a vacancy, out of the readiest of the vacant stipend. The above statute of 1661, c. 52, which, from the special nature of its provisions, was limited in the period as well as the range of its application, was followed by another, which was in force only for a temporary period. By the Act 1672, c. 20, it was provided that for the seven years from its date vacant stipends should be applied for the use of the four Scottish universities as therein pointed out. Although this latter statute, which expired in 1678, was prorogated by an Act of Secret Council for seven years thereafter, it was ruled by a judgment pronounced within this latter period that vacant stipend belonged to the patron,—nothing short of statutory authority being sufficient to deprive him of that which was his *ex lege* (a).

Patron's right
of disposal.

72. On the principle of this decision, patrons possessed an unqualified right of disposal of vacant stipends from 1678 to 1685, when by cap. 18 of that year it was ordained that in time coming these were to be employed by the patron in pious uses within the parish, subject to the maintenance of the minister's manse during a vacancy out of the first and readiest of the vacant stipend. The pious uses referred to besides the reparation of manses are—1st, the building and repairing of bridges; 2nd, repairing of churches; or 3rd, the entertainment of the poor, "as the patron shall determine yearly." In addition to these three general and permanent purposes, vacant stipends within certain dioceses were, during a period of five years from 1685, to be applied in repairing specified bridges and for the use of the Universities of St.

Pious uses
under 1685,
c. 18.

(a) Hepburn, 1681, M. 9946.

Andrews, Glasgow, and Aberdeen, at the end of which period they were thereafter to be applied to one or other of the three general purposes just mentioned. This Act seems to recognise the property of vacant stipends as belonging to the patron, subject to the obligation to apply it as now stated, without prejudice to the existing provisions as to the maintenance of manse during vacancies. The vacancies of churches of which the Crown was patron, and of mensal and patrimonial churches belonging to bishops, were excepted from the operation of the Act.

73. Thereafter the Act 1690, c. 23, which deprived patrons of their right of presentation, expressly reserved to them their right to employ vacant stipends in pious uses within their respective parishes, except where the patron was Romish, in which case he was to employ the same under the directions of the Presbytery. By the Act 1696, c. 26, the provision of parish schools and schoolmasters was declared to be a pious use, and one to which patrons might apply vacant stipends at their discretion. Until the passing of the 54 Geo. III. c. 169, referred to, vacant stipends continued to be disposed of under the above-mentioned statutes.

74. By section 9 of that Act it is declared that when a parish becomes vacant by the death, translation, resignation, or deprivation of the incumbent, the vacant stipend thereby arising subsequent to crop and year 1813 is, in so far as formerly applicable by the patron to pious uses (*a*), to be levied by the collector of the Ministers' Widows Fund, and appropriated to the purposes of the Act, viz. to create and secure a fund or capital stock out of which annuities, varying in amount according to the scale of rates contributed, are payable to the widows, whom failing, to the child or children (till a certain age) of deceased parish clergymen (*b*).

(*a*) The provisions of this Act, s. 10, applied to vacant stipend accruing in Argyleshire—which was formerly applied in an exceptional way under 1690, c. 24—for and after

crop and year 1818, under reservation of the Synod of Argyle right to manse-money.

(*c*) The scheme of the Ministers Widows Fund was introduced by the

Patron's right of disposal reserved by 1690, c. 23.

Schools a pious use under 1696, c. 26.

Application of vacant stipend under 54 Geo. III. c. 169.

CHAP. VIII.

How Act
construed.

75. The provisions of this Act are construed favourably to the appropriation of vacant stipend as therein directed. On this principle the vacant stipend of churches under the patronage of the Crown went to the fund in the same way with every other vacant stipend (*a*). Thus also, when the endowment of a pastoral charge is of a permanent nature, the charge implies a benefice in the sense of the 54 Geo. III. c. 169, and the stipend accruing thereto becomes, on a vacancy, due to the fund, although the charge may not have been created, or even specially sanctioned, by the Teind Court, or the emolument attached thereto as stipend be payable out of teinds (*b*). On the other hand, a voluntary provision, which is personal to the incumbent grantee, and limited in its endurance to the period of his incumbency, is not vacant stipend in the sense of law, and so is not recoverable by the collector for the fund under the Act (*c*). Failure to supply the cure with a competently ordained minister, although arising from the unwarrantable refusal of the Church courts to proceed with a settlement, constitutes a vacancy in the benefice under the statute in question; and stipend accruing during such period of refusal is vacant stipend, and so due to the collector of the fund (*d*).

Vacancy arising from failure to induct.

Unextracted
decree of de-
position.

76. As a sentence of deposition will not cause the benefice "to vaiken," unless it be one which can be practically carried into effect, so, in the case of a deposed minister, "vacant stipend" will not arise while the sentence of deposition remains unextracted, at least when this results from the sentence not being extractable (*e*). The *ratio decidendi* adopted by the Court of Session in the case just cited appears

17 Geo. II. c. 11, and has been subsequently amended and altered by the 22 Geo. II. c. 21; 19 Geo. III. c. 20; and 54 Geo. III. c. 169, which is now the regulating statute in the matter. For its various provisions the reader is referred to the Act itself.

(*a*) See Ivory's Ersk. i. 5, 14, and foot-notes.

(*b*) Magistrates of Stirling. *v.* Gordon, 1837, 15 S. 657.

(*c*) Magistrates of Dundee *v.* Nicol, 1829, 8 S. 66.

(*d*) Earl of Kinnoull *v.* Gordon, 1842, 5 D. 12, as reversed on appeal, 1845, 4 Bell, 126.

(*e*) Livingstone *v.* Grant, 1850, 13 D. 394; *affd.* 1860, 32 Jur. 514.

to have been that the sentence of deposition had not *de facto* been extracted. But from the remarks of the Lord Chancellor (*a*) in the Court of Appeal it would rather seem that the affirmance of the judgment was rested mainly on the effect of the interdicts obtained by the minister as preventing the decree from being extracted and enforced.

77. By a judgment of the whole Court (*b*), overruling a prior judgment by the First Division to an opposite effect (*c*), it was decided that the provisions of the 54 Geo. III. c. 169, with reference to vacant stipends, do not apply to ministers appointed to parliamentary churches under 5 Geo. IV. c. 90. Such ministers are neither bound nor entitled to contribute to the fund. Consequently there is no stipend accruing to such churches which during a vacancy is due to the fund. The provisions of the Widows Fund statutes apply to the minister of a parliamentary church and district which has been erected into a parish *quoad sacra*, under 7 and 8 Vict. c. 44 (*d*), except in the case where the minister was already admitted to the charge before the new parish was erected. On the other hand, ministers of other parishes *quoad sacra*, whether admitted before or after the erection of the church as a parish church, are contributors to the fund (*e*), and it has been decided that stipend accruing in a parish *quoad sacra* during a vacancy is vacant stipend payable to the collector of the fund (*f*).

78. By sections 17 and 18 of 50 Geo. III. c. 84, the proportion of stipend accruing during a vacancy from the parliamentary allowance was specially declared to be payable to the trustees of the Ministers' Widows Fund under 19 Geo. III. c. 20. This provision is now superseded by the general direction contained in section 9 of the 54 Geo. III. c. 169,

All vacant stipend payable under s. 9 of 54 Geo. III. c. 169.

(*a*) Lord Campbell.

(*b*) *Irvine v. Trustees of Ministers' Widows Fund*, 1838, 16 S. 1024.

(*c*) *Gordon v. Trustees of Ministers' Widows Fund*, 1836, 14 S. 509, and 1836, 15 S. 15.

(*d*) *Grant v. Macintyre*, 1849, 11 D. 1370.

(*e*) *M'Lagan v. Brown*, 1887, 14 R. 1083.

(*f*) *Cheyne v. Cook*, 1863, 1 M'P. 963.

CHAP. VIII.

which, applying to parishes generally, includes those the clergymen of which enjoy allowances under either of the Small Stipends Acts, and is applicable as well to that part of their stipend which consists of such allowance as to that derived from teinds.

What vacant
stipend
includes.

79. Vacant stipend within the scope of this Act, 54 Geo. III. c. 169, and relative Acts, means the stipend which *de facto* formed part of the benefice at the time of the incumbent's death, as in contrast to any larger amount of stipend which he could have claimed, and which if he had claimed might have been awarded to him. On this principle it has been ruled that the collector of the Widows Fund could not claim anything beyond the stipend actually paid to the deceased incumbent although a fund existed from which an augmentation of his stipend might have been obtained (*a*). Although the law, or at least the practice, was otherwise formerly (*b*), a charge for vacant stipend now by the collector of the Widows Fund, cannot it would appear, be suspended save on consignment (*c*).

Charge how
suspended.

SECTION XXII.—*Quinquennial Prescription of Stipend.*

Provisions
under the Act
1669, c. 9.

80. By the Act 1669, c. 9, it is provided that ministers' stipends not pursued for within five years after the same are due "shall prescribe in all time coming," unless the said ministers' stipends shall be offered to be proved to be due and resting owing by the defenders' oaths or special writ under their hands. In reply to the defence of the quinquennial prescription, pleaded by the parishioners in an action for by-gone stipend, the decree of locality was founded on by the pursuer as establishing the claim and as a writ within the meaning of the statute. This contention, however, the Court repelled on the ground that the writ required to be under the

(*a*) *Cheyne v. Magistrates of Dundee*, 1866, 4 M.P. 1002.

(*b*) *A Minister's Executors v. Parishioners*, 1697, M. 10,325.

(*c*) 19 Geo. III. c. 20, ss. 55, 56, and 54 Geo. III, c. 169, s. 30.

debtor's own hand, which the decree of locality was not (*a*). The prescription introduced by the statute did not apply to the income or revenues of bishops or of the beneficed clergy which belonged to them as titulars, but merely to the provisions awarded to the stipendiary clergy as stipend (*b*). The plea of *bona fide* consumption is not open to a heritor in answer to a minister's claim for arrears of stipend (*c*).

81. The expression "ministers' stipends" in the statute includes vacant stipend, which is also subject to the quinquennial prescription (*d*). In a case where the tutor-at-law of a patron who was insane paid ann to the representatives of the deceased incumbent, and applied the vacant stipend to pious uses, it was held that in making these payments the tutor acted as *negotiorum gestor* for the heritors, and that on this account they could not plead the quinquennial prescription in defence to a demand by the executors of the deceased patron against certain of the heritors for their proportion of these payments which had been made upwards of five years previously (*e*).

Vacant stipend
subject to pre-
scription.

SECTION XXIII.—*Augmentation of Stipend under 1707, c. 9,
and prior Statutes.*

82. The augmentation of stipend contemplated and authorised by these Acts is confined to augmentations out of the teinds of the parish. Teind is the proportion of the fruits of the earth devoted to the sustentation of the clergy. But if all this proportion be in the case of a particular parish already so applied, then there remains no unexhausted or surplus, or as it is now usually termed, free teind, whence an addition to the incumbent's stipend can be allocated. To encroach

Confined to
stipend from
teind.

(*a*) Baird *v.* Parishioners of Fyvie, 1678, M. 11,061.

(*b*) Hamilton *v.* Harries, 1683, M. 11,061.

(*c*) Haldane *v.* Ogilvy, 1871, 10 M.P. 62.

(*d*) Gloag *v.* Macintosh, 1753, M. 11,063, and Elchies, *Stipend*, 8, and Notes.

(*e*) Graham *v.* Pate, 1799, M. 11,063.

CHAP. VIII.

further for his behoof on the fruits of which teind is a part would be to appropriate to him stipend not out of teind but out of "stock." But, as their provisions very distinctly prove, none of the above statutes warrant an encroachment on "stock" (a).

Surplus teind,
and lapse of
twenty years.

83. Hence, to render an augmentation competent, it is essential that there be surplus or free teind in the parish (b). Further, by section 2 of 48 Geo. III. c. 138, it is provided that no stipend augmented or modified by decree pronounced after 30th June 1808 may be again augmented or modified until the expiry of twenty years from the date of such decree; and that no stipend may be subsequently augmented or modified until the expiry of twenty years from the date of the last final decree of modification. In construing this latter provision it has been ruled that the last final decret of modification means, not the interlocutor granting the modification when such has been brought under review, but the final interlocutor authorising the modification and terminating the litigation on this point; and that the words "it shall not be competent" to augment imply that it shall not be competent to commence the action by citation of the defenders (c).

Modification of
the rule stated.

84. In order, therefore, to warrant an augmentation it is as a general rule essential (1) that there be surplus or free teind in the parish; and (2) that twenty years have elapsed since the date of the last final decree of modification. But in a case where the previous decree of modification had been

(a) See per Lord President Hope in *M'Lean v. Wighton*, 1824, 3 S. 318.

(b) The term surplus or free teind, as here used, means that amount of teind found within the parish unallocated for the payment of the minister's stipend. "Free teind" is also frequently used to signify the teinds payable to the lay titular, either by heritors who have not heritable rights to their teinds, or by tacksmen, to the extent of the teind duty paid by them to the titular.—See per

Lord Corehouse in *University of St. Andrews v. Commissioners of Woods*, 1838, 16 S. at p. 1352; per Lord Justice-Clerk Hope in *Kinnaird v. Common Agent in Locality of Errol*, 1850, 13 D. at p. 102; Ersk. ii. 10, 51, *in fin.* and foot-note.

(c) *Daun v. Heritors of Inch*, 6th June 1810, F.C. See also Minister of Banchory-Ternan, 20th June 1810, in note to this case, and Minister of Strathmiglo, Connell, Tithes, vol. i. p. 417.

pronounced by the Court on erroneous information, *bona fide* communicated by the titular to the minister, as to the amount of surplus teind, the latter in consequence limited his claim for, and the Court awarded him, additional stipend to an extent less than they would otherwise have done. On the minister becoming aware that there was in reality a larger amount of surplus teind than formerly represented to him, and by him to the Court, he applied within twelve years from the date of said decree of modification for another augmentation, which the Court sustained, and in the circumstances granted, notwithstanding the limitation in the statute (*a*). Again, when an augmentation is *wholly* refused, a new action of augmentation may be brought without awaiting the lapse of the twenty years (*b*).

SECTION XXIV.—*What Ministers entitled to demand on Augmentation under 1707, c. 9, and prior Statutes?*

85. As a general rule every minister whose stipend is modified out of teinds under any of the above Acts is, subject to the conditions contained in the previous paragraph, entitled to demand an augmentation to his stipend. Within this category are embraced the incumbents of parishes *quoad omnia* of which the charges are single, and the first ministers of collegiate charges in such parishes. On the other hand, ministers, although possessed of the status of parochial incumbents whose stipends are not modified out of teinds under the said Acts, but are derived from other sources, are not entitled to demand augmentation of stipend out of the teinds under the provisions of the above statutes. The second ministers of collegiate charges are, save in exceptional instances—*ex gr.*, where the stipend though voluntarily provided has been modified by a decree of the Parliamentary

Ministers of
quoad omnia
parishes.

Collegiate
charges.

(*a*) *Dow v. College of Glasgow*, 1825, S. T. 77.

(*b*) *Per curiam* in *Gardner v. Heiritors of Rathven*, 1838, 1 D. 158.

CHAP. VIII.

Quoad sacra
and parlia-
mentary
churches.

Burgh
churches.

Minister only
can sue.

Commissioners (a)—excluded from making such demands. A similar remark applies to ministers of *quoad sacra* parishes under 7 and 8 Vict. c. 44, and to assistant ministers under 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, both because the amounts of their stipends are fixed once for all by the terms of their appointment, and also because their stipends are not *de facto* payable from teinds. In several cases ministers of churches within burgh which had been erected by the magistrates were awarded augmentations of stipend, but this was done in the Court of Session, not in the Court of Teinds, and the decisions proceeded upon contract or obligations undertaken by the magistrates when the churches were provided (b). Where the magistrates have bound themselves to provide a stipend, that stipend may be augmented according to the circumstances of the time. In other cases the liability of the magistrates is limited under the contract or decree erecting the benefice, and in this event there can be no augmentation (c).

86. The minister, as the only incumbent, is the sole party entitled to sue for an augmentation of his stipend. One who is merely the minister's assistant is not entitled to do so (d), and this even although a portion of the stipend formerly modified has been specially allocated to and drawn by him under a scheme of locality approved of (e). Neither does the circumstance that the assistant is also the successor of the minister give him a title (f). In granting an augmentation in a case where the minister is permanently laid aside, the Court may direct that the augmentation shall be paid either

(a) *Fairnie v. The Heritors of Dunfermline*, 1749, M. 14,796, Elchies, *Stipend*, 6, and Notes. See p. 291.

(b) *Cesar v. Magistrates of Dundee*, 1848, 20 D. 859; *Magistrates of Greenock v. Peters*, 1892, 19 R. 643, affd. 20 R. (H.L.) 42; *Rainie v. Magistrates of Newton-on-Ayr*, 1895, 22 R. 633 and 24 R. 606; *cf. Magistrates of Kilmarnock v. Aitken*, 1849,

11 D. 1089; *Thomson v. Magistrates of Greenock*, 1896, 23 R. 405.

(c) *Ibid.*

(d) *Marshall v. Town of Kirkcaldy*, 1738, M. 14,794, Elchies, *Stipend*, 1, and Notes.

(e) *Macruer v. Macnicol*, 1803, M. 15,711.

(f) *Shaw v. Heritors of Robertson*, 1806, M. *Stipend*, Appx. 5.

in whole or in part to the assistant, or the assistant and successor, who is actually doing the work of the parish (*a*). CHAP. VIII.

SECTION XXV.—*Nature of Minister's right to claim an Augmentation.*

87. The right on the part of a parish minister to demand an augmentation of stipend (when such a right pertains to him) is in its nature indefeasible. He cannot be deprived nor can he dispossess himself of it; neither can he do anything to defeat the exercise of this right on the part of a succeeding incumbent. Hence, an obligation of a minister “never to ask or sue for any augmentation of glebe or stipend,” even although granted for an onerous consideration, was found not to be binding on him (*b*). Neither will an agreement on his part not to bring another augmentation during his incumbency, on condition of the heritors withdrawing their opposition to a particular claim for an increase to his stipend, bar him from renewing a demand to this effect after the lapse of the statutory period (*c*). Right to claim augmentation indefeasible.

88. The principle just alluded to is forcibly illustrated in the case of Turriff (*d*). Here the minister, who being parson was titular of the teinds of the parish, granted a lease thereof to the patron for a specified tack-duty, with warrandice against fact and deed. This tack-duty virtually represented the minister's stipend, who, conceiving that the same did not amount to “a sufficient maintenance,” brought twenty-five years after the date of the lease an action of augmentation against the patron. Besides disputing the competency of the action, the patron pleaded that, even if competent, it would be nugatory, in respect that under the clause of warrandice Case of Turriff.

(*a*) *Stevenson v. Carnegie*, 1863, 1 M'P. 444; *Minister v. Heritors of Carsphairn*, 1893, 20 R. 521.

(*b*) *Boyd v. Earl of Galloway*, 1794, M. 9583; *Forbes, Tithes*, p. 389, and case cited.

(*c*) *Earl of Kellie v. Minister of Carnbee*, 1803, M. 15,710.

(*d*) *Stewart v. Earl of Fife*, 1800, M. *Stipend*, Appx. 4.

(*e*) The Act 1693, c. 25, abolishing parsonages, was to take effect only when a stipend was modified, and this had not been done here.

CHAP. VIII.

the minister would be bound to re-communicate to him any augmentation he might obtain. The Court, however, found that the minister was entitled to sue for an augmentation.

Re-augmentations.

89. As the Teind Court may at their discretion augment a stipend when free teind exists, and as the only limitation on a minister's right in such circumstances to demand an augmentation results from the condition that he cannot do so within a period of twenty years from the date of the last modification, the Court have power to re-augment a stipend until the free teinds of the parish are exhausted (*a*). Hence the minister's right to claim an augmentation includes his right to claim re-augmentations of stipend, and this right, like the other, is also indefeasible.

SECTION XXVI.—*Mode of demanding an Augmentation of Stipend.*

Summons of augmentation.

90. The form in which a minister makes a demand for an increase of his stipend is by raising a summons of augmentation, modification, and locality before the Teind Court (*b*) against the patron, titular, and tacksmen of the teinds, and the heritors and liferenters liable in payment of teinds within the parish. The conclusions of the summons are twofold:—1st, to augment and modify a stipend to the pursuer; and, 2nd, to allocate the payment of such augmented stipend on the defenders according to their rights and interests in the teinds. The amount of the desired augmentation is not stated in the summons, the general averment being that the present stipend is small and insufficient for the support of the incumbent,—but the precise extent of the addition craved must be intimated by the minister to the

(*a*) Milligan *v.* Wedderburn, 1779, M. 14,816, as reversed, 2 Paton, 621; Minister *v.* Heritors of Tingwall, 1786, M. 14,817, as reversed, 3 Paton, 140; Minister of Prestonkirk *v.* Wemyss, 1808, M. *Stipend*, Appx. 6, affd. 5 Paton, 210.

(*b*) In proceedings of a discretionary nature, the Teind Court—under the

style of the Lords Commissioners for Teinds—by the 2 and 3 Vict. c. 36, s. 8, is composed of the Judges of the two Divisions of the Court of Session, along with the Lord Ordinary in Teind Causes. Five of their number constitute a quorum. See also 31 and 32 Vict. c. 100, s. 9.

Presbytery of the bounds in terms of section 17 of 48 Geo. III. c. 138. A demand is also sometimes introduced for an increased allowance for communion elements.

91. Stipend being payable out of the fruits of the soil, the date from which the augmentation is sought bears reference to an incumbent's interest in the stipend, as the same is regulated by the terms of Whitsunday and Michaelmas, when the year's crop is assumed to be sown and reaped respectively. Accordingly, if the summons be signeted after Michaelmas but before Whitsunday, the augmentation will be asked to apply to the whole of the next year's crop and thereafter; if after Whitsunday and before Michaelmas, to the half of the current year's crop and thereafter.

92. By sections 8 and 9 of 48 Geo. III. c. 138, it is provided that, save in certain exceptional cases (*a*), every stipend augmented after the date of the Act (30th June 1808) is to be wholly modified in grain or victual, and every stipend formerly modified in money is to be converted into grain or victual according to the fiars prices, which are struck in the month of February annually, as after mentioned (*b*). Consistently with these provisions and those contained in section 11 of the statute, the summons craves that the value of the victual stipend is to be payable in money according to the fiars prices of the county between Christmas and Candlemas yearly, after the separation of the crop from the ground, or as soon thereafter as the fiars prices have been struck, and the money stipend, if any, at Whitsunday and Martinmas yearly.

(*a*) The exceptions referred to in the statute are understood to relate to the cases—(1) where the whole teinds of the parish, having been valued in money, are modified to the minister; and (2) to augmentations modified in articles or commodities to which the fiars prices do not apply, as fish, butter, eggs, &c., which in some parts of Scotland, and particularly in Orkney and Shetland, are made liable for stipend. In the

former case, the extent of the teind fund, whence stipend is payable, is fixed by a monetary standard. Being so fixed, the heritors cannot be called on to contribute beyond their money valuations. Any modification, therefore, in victual, which, on conversion at the fiars prices, exceeds the money valuation of the teind fund, would be inoperative.

(*b*) See *post*, p. 332.

CHAP. VIII.

Service of the
summons.

93. The mode of procedure in the action is regulated mainly by the Act of Sederunt 5th July 1809, passed after and in terms of the Act 48 Geo. III. c. 138. In lieu of the former mode and *induciae* of service (*a*) the defenders, if they do not accept service, may be cited by public notice, given by the precentor from his desk in the parish church before the congregation is dismissed from forenoon service, intimating the action, at least six weeks prior to the calling of the summons and the particular day—being now a Monday—on which it is to be called (*b*). Such notice must be repeated on three several Sundays, and a certificate that this has been done in the presence of (at least) two parishioners, who sign the certificate as witnesses, must be granted by the precentor and by him transmitted to the agent of the minister suing for the augmentation. An intimation in writing of the process, in similar terms to that made by the precentor, is affixed to the most patent door of the church by a messenger-at-arms or constable on the day when the first notice above referred to is given by the precentor, and a certificate is returned by the messenger or constable, signed by himself and two witnesses, that such notice was affixed by him as aforesaid. The pursuer must also cause notice to be inserted on three several days in the undernoted newspapers (*c*), that he has brought such an action, specifying the particular day on which the summons is to be called in Court. The first of these notices, which are in the form of advertisements, must be inserted not less than six weeks prior to such day (*d*). This mode and currency of intimation are

Notice, how
given.

(*a*) Viz. six days' *induciae* to persons within Scotland, forty days to persons in Orkney and Shetland, and sixty to persons furth of Scotland.—See Russell's Forms of Process, 226.

(*b*) Formerly Wednesday was the day on which teind summonses were called. But, as the sitting of the Teind Court was, by 31 and 32 Vict. c. 100, s. 9, changed from every alternative Wednesday to every alternative Monday during the session, teind summonses are now "called"

on Mondays instead of Wednesdays, as heretofore.

(*c*) Viz. the *Scotsman* and a newspaper circulating in the county or counties referred to in each notice.—Act of Sederunt 24th Feb. 1888.

(*d*) The Officers of State are cited at the office of the Keeper of Edictal Citations on *induciae* of six weeks; and the Commissioners of Woods, &c. by the service of the summons on the Lord Advocate and intimation thereof to the Commissioners, by letter sent through the Post-Office.

sufficient, although one or more of the defenders be in minority or furth of the kingdom at the time. CHAP. VIII.

94. To guard against collusion between the minister and the heritors, it is by section 17 of 48 Geo. III. c. 138, required that the Presbytery of the bounds be also cited. This is done by letter addressed to the moderator and to the clerk of the Presbytery, which must be inserted in the Presbytery records one month before the summons is called in Court. A certificate to this effect by the Presbytery clerk, along with the foresaid certificates by the precentor and messenger-at-arms or constable and the newspaper advertisements, complete the citation which is required to be given. Should a defender die during the dependence of the process, his heir may be called by a diligence in the manner and on the *inducie* before in use, but executed either by a messenger-at-arms or a constable. If the process require to be wakened, this was formerly done by a summons of wakening as directed by the Act of Sederunt; but the present practice is to waken by interlocutor in terms of 31 and 32 Vict. c. 100, section 95, or by minute of consent (*a*.) Citation of the Presbytery.
Death of a defender.
Wakening.

95. When the summons of augmentation is signeted the pursuer lodges with the teind clerk a note stating—(1) the amount of his stipend, and how much is paid in money and how much in victual—the kind of victual and the measure in which it is paid; and (2) the amount of communion element allowance. The minister must also at this stage of the proceedings produce a note of the rental of the parish distinguishing therein the amount of rent effeiring to each heritor (*b*). Procedure after summons is signeted.

(*a*) On the principle—recognised in *Magistrates of Edinburgh v. Learmonth*, 1855, 18 D. 77—that the procedure in teind causes is by this Act assimilated to that in ordinary causes.

(*b*) The object of this rental was to afford the data for calculating the amount of free teind. Consistently with this object, the rental was

formerly in use to be confined to the alleged *teindable* rental of the lands in the parish; and in the disposal of objections thereto the amount of free teind was ascertained. By the present practice, however, this rental is made up on the footing of including the gross rental of the lands. Hence it forms no real criterion of the amount of the teind fund.

CHAP. VIII.

After the summons is called the pursuer may enrol the case for an order to allow all concerned to see the summons and the writs therewith produced for fourteen days. On the expiry of this period the cause may be again enrolled for an order holding the heritors confessed on, *i.e.* held as admitting the amount of the rental given in by the minister to the Court; or otherwise assigning a day for deponing on the rentals, *i.e.* stating upon oath before a commissioner appointed by the Court what the amount of their respective rentals is. In modern practice the heritors never object to the rental as given in by the minister, and are almost as a matter of course held confessed upon it. This is natural, as such a judicial admission upon their part of its accuracy is not held to preclude them from afterwards denying its accuracy (*a*).

Where
existence of
free teind is
denied.

96. When the minister comes to make his demand for an augmentation he is sometimes met on the part of the heritors or some of them with the allegation that there are no surplus teinds, or in ordinary language no free teind. As the Court has no power to modify stipend out of stock, they cannot pronounce an effectual or operative decree of augmentation unless there exist unexhausted teind to the extent of the augmented stipend. Where, however, the existence of free teind is denied upon grounds requiring investigation, and the heritors do not support their denial by the production of writings *ex facie* conclusive, the Court will award an augmentation and leave the question to be determined in the process of locality (*b*). Where the documents are *ex facie* negative of the existence of free teind, and a declarator or reduction is necessary upon the part of the minister, the Court may sist the process of augmentation (*c*).

(*a*) *Learmonth v. City of Edinburgh*, 1857, 20 D. 190.

(*b*) *Simpson v. Orr-Ewing*, 1886, 13 R. 594; *Minister v. Heritors of Peebles*, 1897, 24 R. 293. The practice in regard to this matter is now fixed, but formerly it varied.

Cf. *Frood v. Earl of Stair*, 1874, 2 R. 76, and cases there cited.

(*c*) Case of *Frood*, *cit.* and per Lord President in *Simpson v. Ewing*, *cit.* See also *Minister of Borthwick v. Dundas*, 1876, 3 R. 361.

97. The expedient of pronouncing a decree of augmentation before answer as to the existence of a teind fund does not accelerate the enjoyment by the minister of the additional stipend modified to him—for he can only draw stipend from teind which is *de facto* free. Yet although the operative effect of such a decree is suspended until the question as to the actual existence of a teind fund is disposed of in the locality, the result may be to give the minister right to claim interest on the arrears of the additional stipend modified (a). Another possible benefit accruing to him from a decree so pronounced may be that the question whether there is free teind or not will be litigated by the common agent against one or more of the heritors in the locality in such a form that the minister may escape the burden of the expenses incurred in its discussion and settlement.

CHAP. VIII.

Benefit to the minister of immediate decree.

SECTION XXVII.—*Grounds for granting an Augmentation of Stipend.*

98. In judging of the extent to which in a given case a demand may with a reasonable prospect of success be made for an augmentation of stipend, the principal circumstances to be attended to seem to be the following, viz.—1st, Date of the last modification of stipend and its amount; 2nd, The amount of free teind in the parish; 3rd, The extent and conformation of the parish and its condition in regard to roads, &c., also the existence or not within it of collieries, public works, fishing stations, or the like; 4th, The price of living in the parish as compared with other neighbouring parishes; 5th, The resident population generally of the parish and the numerical increase of the parishioners since the date of the last modification; 6th, The increased demands (if any) on the minister's labours and time in the discharge of his parochial duties, resulting from such increase in the

Governing circumstances.

(a) Dawson v. Pringle, 15th June 1808, F.C., and M. *Annualrent*, Appx. 5.

CHAP. VIII.

parish population or from any other supervening cause of a permanent nature; 7th, The calls on the minister's hospitality or charity; 8th, The amount of stipend paid to the clergymen of neighbouring parishes or of parishes which, in point of size, population, rate of living, &c., most nearly approximate to the one in question; and 9th, The money value of the stipend according to the price of grain in recent years in comparison with its value at the date of the last augmentation.

Former
practice.

99. Formerly the practice obtained that, unless some material change had occurred in the circumstances of the parish since the date of the last modification, no augmentation was awarded. The change of circumstances required to be such as directly or indirectly created in the minister's favour an equitable claim to additional remuneration arising either from increased parochial duties imposed, or increased personal or domestic expenditure entailed on him (*a*). Further, as would rather appear, the change of circumstances required to be due to influences operating within the parish, as opposed to such as were of general application throughout the country. Hence it was ruled that the diminution of stipends consequent on the repeal of the corn laws was not *per se* a ground for granting an augmentation (*b*). At the same time the higher rate of stipend enjoyed by the ministers of neighbouring parishes appears sometimes to have been deemed a sufficient reason *per se* for granting an augmentation (*c*).

Present
practice.

100. It is undoubtedly the case that during the last fifty years the Teind Court has shown a much greater readiness

(*a*) See *M'Lean v. Wighton*, 1824, 3 S. 318; *Brewster v. Marquis of Abercorn*, 1837, 15 S. 991; *Gardner v. Heritors of Rathven*, 1838, 1 D. 158; *Minister v. Heritors of Kilrenny*, 1840, 2 D. 1047.

(*b*) *Whyte v. Heritors of Fettercairn*, 1850, 13 D. 238. Here, it is true, the minister got an additional

chalders, but this was quite irrespective of the main ground on which he based his application, viz., the fall in the price of grain consequent on the repeal of the corn laws.

(*c*) As an example to this effect see *Gordon v. Heritors of Monkquhitter*, 1839, 1 D. 789.

than formerly to augment stipends, and does not require such clamant grounds as formerly to warrant an increase. The Fettercairn case, where the Court refused to give any effect to the fall in prices consequent upon the repeal of the corn laws is not now followed, if that case is to be held as laying down that a permanent fall of prices is an irrelevant consideration. As the primary burden upon the teinds is to make an adequate provision for the minister, and under the conditions of modern life a minister does not live appreciably more cheaply when corn is cheap, it is clear that if there be a permanent fall in the value of grain a minister whose stipend is modified in grain will require more chalders to enable him to maintain his position than was required before the fall in prices. The Teind Court now invariably grants some augmentation; and, when the heritors or those affected consent, generally to the full amount craved. If opposition be made the Court naturally examines more minutely into the circumstances of the case. Their judgment is subject to review by appeal, but an appeal upon the question of the amount allowed is unknown in practice and would not be favourably entertained (*a*). The alleged misconduct of the minister does not form a relevant objection on the part of the heritors against his obtaining an augmentation. This is a charge which falls to be investigated and dealt with by the Church judicatories; and it does not form a competent matter for inquiry in the course of a process of augmentation (*b*).

101. Although a minister to whom an assistant and successor is appointed may be disabled from personally performing his parochial duties, this does not *per se* constitute a reason for refusing an augmentation of stipend. As pointed out above, however, the Court may order the augmentation to be paid in whole or in part to the assistant and successor (*c*). As regards the question of the amount of augmentation to be

Assistant and
successor.

(*a*) *Milligan v. Heritors of Kirkden*, 1779, M. 14,816, as reversed, 2 Paton, 621.

(*b*) *Stevenson v. Carnegie*, 1863, 1 M'P. 444.

(*c*) *Supra*, p. 316.

CHAP. VIII.

granted in such circumstances, this matter falls to be dealt with on general principles, irrespective of the specialty now adverted to.

Augmentation
dependent on
special circum-
stances.

102. It is impossible to reduce to particular rules these general principles, or to indicate more definitely than has been already done either the circumstances which warrant a demand for additional stipend or the amount of the addition to be asked. Every case must necessarily depend upon its own merits; and in regard to these, each intending applicant for an augmentation will naturally consult his agent before instituting legal proceedings. In connection with this subject, however, it may here be remarked that while the usual amount of a clergyman's stipend was in the seventeenth century about eight chalders^(a), stipends, as recently modified in parishes where there is sufficient free teind, may, speaking generally, be said to range from twenty-four to forty chalders.

Extent of glebe
as affecting
augmentation.

103. For some time the point seems not to have been definitively settled whether the possession of a glebe proper of more than ordinary value operated adversely to a minister's claim for augmentation of his stipend. As deducible from the earlier decisions on the subject, the tendency of judicial opinion seems to have been to disregard as irrelevant any extraordinary value in the temporality of the benefice in modifying a stipend. It is to be remarked, however, that in some of the earlier cases referred to as establishing this doctrine it seems doubtful whether the lands attached to the cure fell strictly within the category of glebe lands pertaining to the benefice, and were not rather of the nature of private provisions or grants personal to the successive incumbents. In a case occurring in 1720, where the parish was a united one, the Court modified a stipend of 1100 merks, disregarding apparently the circumstance, which was

Earlier
decisions on
the point.

(a) See per Lord Medwyn in *Stewart v. Brown*, 1851, 13 D. 565.

founded on by the heritors, that the minister had three glebes (*a*). A similar course was adopted by the Court in 1818 and again in 1822 (*b*).

104. As the result of other and more recent decisions, however, it would appear that the possession by a minister of a legal glebe (*c*) of uncommon value will operate to limit the amount which the Court may award to him on any augmentation being granted of his stipend (*d*). Thus, in a case in 1808 the Court laid down and apparently acted on the principle that the value of the glebe, which was in this instance worth L.80 annually, ought to affect the amount of augmentation modified (*e*). A similar view seems to have been applied in a case which occurred in the following year (*f*) and in another case in 1827 (*g*). In 1835 the point again rose for decision in the important case of Blair-Atholl (*h*). After full and careful consideration by the whole Court, and on a review of all the authorities, it was by a majority of nine to four (*i*), decided that a glebe of uncommon extent and value was to be taken into consideration in modifying a stipend out of teinds. Here the minister was incumbent of a united parish to which apparently four glebes were attached yielding a rent of L.80, besides ground in his own occupation valued at L.15 per annum. In this case Lord Balgray remarked that while it may be deduced as a general rule that the glebe should be thrown out of view by the Court when modifying a stipend, yet this general rule, like every other, must in extraordinary

Later practice.

Cases illustrative of later practice.

Blair-Atholl.

(*a*) Case of Cairny, 1720, 1 Connell, Tithes, p. 418.

(*b*) Kennedy *v.* Richardson, 9th Dec. 1818, F.C., and the cases (not reported) there cited; and the case of Beith, 1822, mentioned and founded on by Lord Justice-Clerk Boyle and Lord Balgray in Stewart *v.* Glenlyon, 1835, 13 S. 797, 798.

(*c*) *I.e.* a glebe provided by the heritors under the statutes.

(*d*) An example occurs in Carnegie *v.* Spied, 1849, 11 D. 1250, of a house and garden being allocated by the

Teind Commissioners in lieu *pro tanto* of stipend.

(*e*) Minister *v.* Heritors of Old Deer, 23rd Nov. 1808, F.C.

(*f*) Case of Buitie, 22nd Nov. 1809, mentioned in a note to the report of Old Deer.

(*g*) Stevenson *v.* Duke of Buccleuch, 1827, S. T. 137.

(*h*) Stewart *v.* Glenlyon, 1835, 13 S. 787.

(*i*) The Judges who voted in the minority were Lord President Hope, Lord Justice-Clerk Boyle, and Lords Moncreiff and Cockburn.

CHAP. VIII.

Voluntary
addition to
benefice.

circumstances be liable to exceptions. A different view was adopted by Lord Moncreiff, who, on a review of the early cases on the subject, expressed the opinion that the law was solemnly settled by former decisions in an opposite way to that adopted in this instance by the majority of the Court.

105. The principle so decided as ruling the case where the incumbent has an unusually valuable legal glebe applies equally to the case where he is possessed of land attached to the cure given of old by landowners in the parish to maintain the incumbent and relieve the heritors from the payment of teind (*a*). On the other hand, where there is a voluntary mortification of lands or other revenues, this is regarded as made for the benefit of the minister, not of the heritors, and is not taken into account (*b*). Nor is regard paid to an addition to revenue obtained by feuing the glebe (*c*). In dealing with augmentations and modifications of stipend, law pays no regard to the *private* fortune of the clergyman, however considerable it may be, for it is for the benefice, not for the present incumbent, that the Court modifies a stipend.

SECTION XXVIII.—*Procedure after an Augmentation is obtained.*

Augmentation
sometimes
modified as a
separate
addition.

106. Recognising the existing amount of the stipend and giving effect to the addition awarded, the Court “modify” the same as the stipend to which the incumbent and his successors in the cure are entitled, and decern therefor against the defenders (*d*). It is sometimes for the advantage of the minister that the existing stipend, as modified, should not be

(*a*) This rule was adopted by the Court in *Allan v. King's College of Aberdeen*, 23rd Jan. 1811, F.C., and is recognised by Lord Justice-Clerk Boyle in *Stewart v. Glenlyon*, *supra*. See also *Stevenson v. Duke of Buccleuch*, 1827, S. T. 137.

(*b*) *Per curiam* in cases of *Stevenson* and *Allan*, *supra*, and in case of

Minister v. Heritors of Kilmalcolm, 1875, 3 R. 32.

(*c*) Case of *Kilmalcolm*, *supra*.

(*d*) Where this is done in the absence of the heritors and without their knowledge they may be reponed upon payment of expenses.—*Buchanan v. Gilmour*, 1883, 11 R. 59.

interfered with on the occasion of his obtaining an augmentation. When this is so, instead of asking the Court to modify such stipend with the additional amount granted *in cumulo*, he will crave the Court to modify the augmented stipend as an addition to the present localled stipend. The localling of the additional amount of stipend will be adjusted in the course of a new locality applicable thereto, and the former locality will in the meantime be undisturbed. When the apportionment of the additional stipend is adjusted a final scheme of locality will be prepared in which the old localled stipend will be added to that augmented, and on approval decree will be pronounced for the *cumulo* amount.

107. As elsewhere stated, the process of locality was originally a separate process from that of the modification. Although a locality was sometimes insisted on by the minister, he was not obliged or indeed directly interested to bring a locality. A decree pronounced in his favour in the process of modification was quite sufficient for his purpose, inasmuch as he could under such decree operate payment of the stipend modified from each of the heritors to the extent of the teinds intromitted with by them respectively. Accordingly, prior at all events to the Act of Sederunt 5th July 1809, the principle seems to have been applicable "that the "minister has nothing to do with the process of locality, "which is entirely the concern of the heritors" (a).

108. In consequence of the provisions contained in this Act of Sederunt, the process of locality now invariably forms a part of the process of augmentation and modification. When the decree augmenting and modifying the minister's stipend is pronounced the cause is remitted to the Lord Ordinary to prepare a locality and report. After the lapse of not less than three months from the date of the interlocutor ordaining the heritors to produce their rights to teinds, the

Minister's
interest in a
locality.

Remit to
Lord Ordinary
to prepare
locality.

(a) Per Lord President Campbell in *Dawson v. Pringle*, 1808, M. *Annual-rent*, Appx. 5.

CHAP. VIII.

Interim
scheme.

minister may obtain a remit to the teind clerk to prepare a scheme of locality, either according to the proven rental or according to the heritors' rights and interests if any such be produced. The scheme so prepared is forthwith approved of *ad interim* by an interlocutor, which cannot be reclaimed against by a heritor (a); and, according to this interim scheme, unless it is set aside or superseded under the provisions of the Act of Sederunt 20th June 1838, the minister's stipend is paid until a final locality is settled, the decree in which regulates the payment of the stipend until another augmentation is obtained.

Acted on till
final locality.

109. Formerly, the minister, after obtaining an augmentation, might have charged any heritor as an intromitter with the teinds to pay, but now the interim scheme is regarded as the rule of payment of the minister's stipend until a final decree of locality is pronounced (b). If, in consequence of a surrender of teinds or otherwise, the minister is under such interim scheme precluded from obtaining payment of a considerable part of his stipend, the Lord Ordinary may, on being moved to this effect, appoint a new interim scheme, with a state of arrears under the former scheme, to be prepared, and this new interim scheme subsists as the rule of payment until it be in turn superseded by another scheme, interim or final, as the case may be (c). When a surrender has been made under a bill of suspension by a heritor after an interim scheme is approved of, the minister or the common agent may accede to the same, and in a minute move the Lord Ordinary to appoint a new interim scheme at the expense of the heritor (d). The plea of *bona fide* consumption is not available to a heritor who has underpaid the minister under an interim locality (e). But where, under a final scheme, teinds have

New interim
scheme.

(a) M'Diarmid v. Earl of Moray, 1862, 24 D. 715, overruling apparently Farquhar, 1833, 6 Jur. 66, and Oswald v. Martin, 1835, 7 Jur. 355.

(b) As bearing upon this point see per Lords Ivory and Deas in M'Diarmid v. Earl of Moray, *supra*,

24 D. at p. 719, and Ersk. Inst. ii. 10, 47.

(c) A. S. 20th June 1838, s. 1.

(d) *Ibid.* s. 4.

(e) Haldane v. Ogilvy, 1871, 10 M'P. 62.

escaped being localled upon, the heritor appears not to be liable for bygones (a).

CHAP. VIII.

SECTION XXIX.—*Conversion of Victual Stipend into Money.*

110. The amount of stipend augmented is granted in the form of an additional quantity of victual, viz., so many chalders of grain. Prior to the Union the species of grain was oatmeal and bear. It is now ordinarily oatmeal and barley. Sometimes the particular measure of the chalders modified is specified in the decree. When no local measure is mentioned, then the Linlithgow measure is implied as the standard measure under the Act 1661, c. 38 (b). The victual stipend modified is payable to the minister in money according to the fiars prices of the particular kind of victual as appearing from the annual fiars prices of the county in which the parish is situated, struck for the crop and year for which the stipend is due.

Stipend modified in chalders of grain.

Convertible at fiars prices.

111. In all modifications the Court is authorised and required (save in excepted cases (c)) to convert any stipend previously modified in money into victual according to the average fiars of the county applicable to the particular kind of grain for the seven years immediately preceding the decree of modification; or if the parish be not altogether situated within the same county, according to the average of two or more adjoining counties or other county as the Court may fix (d). The Court cannot now authorise the minister to receive in kind a stipend modified in whole or in part in victual. This rule applies even where the whole teinds of the parish are modified for stipend (c), or where the whole teinds of one heritor or of all the heritors in the parish have

Stipends previously modified in money.

Stipend not payable in victual.

(a) Elder v. Fotheringham, 1869, 7 M.P. 341.

(b) See *per curiam* in Minister of Rothsay, 24th May 1820, F.C.

(c) See note (a), p. 334.

(d) 48 Geo. III. c. 138, ss. 9 and 10.

(e) *Ibid.* s. 11; and Smith v. Duke of Portland, 22nd June 1814, F.C.

been valued in victual and surrendered to the minister (*a*). In these, as in other cases generally, the Court must decern the value of the stipend, modified in victual, to be paid to the minister according to the fiars prices of the kind of victual modified, annually struck in the county for the crop and year for which the stipend is payable (*b*); or if the parish be not wholly situated in the same county, or if there be no fiars struck for the kind of grain in which the stipend is modified according to the fiars prices of such adjoining counties or other county as the Court may see fit (*c*). When different rates of annual fiars prices are struck the conversion rate from victual to money, or *vice versa*, is to be according to the highest annual fiars prices (*d*).

Striking of
more than one
fiars price.

112. This last provision has given rise to a good deal of misunderstanding. Long before the application of fiars prices to the ascertainment of the pecuniary value of ministers' stipends, it had been the custom in some counties, owing to the different quality of grain in the uplands and the lowlands, to strike two or more fiars, generally two, one for the better or first quality and one for the poorer or second quality. The Legislature did not propose to disturb this practice where it existed, but at the same time it desired to fix a uniform rate so far as minister's stipends were concerned for the whole of each county. In this view it was deemed necessary to choose the one or the other set of prices, and the Legislature gave the benefit to the ministers. As each minister was theoretically entitled to a share of the grain of his own parish, it would have been to the prejudice of the ministers of the richer parishes to have adopted the second fiars as the rule, and for the same reason it was to the prejudice of the heritors of the poorer parishes to adopt the first fiars as applicable to them. To

(*a*) Maxwell v. Dow, 2nd June 1813, F.C.

(*b*) 48 Geo. III. c. 138, s. 11.

(*c*) *Ibid.* s. 12. In 1888, the barley fiars of the county of Renfrew having been reduced, the

Court of Teinds directed the fiars prices of barley for the county of Lanark to be substituted. See Elliot's Teind Court Procedure, p. 222.

(*d*) *Ibid.* s. 13.

this prejudice, however, these heritors were put for the sake of a uniform rule. It seems obvious that where but one set of prices was struck, and these average prices for the whole grain of the county (all spoilt grain being excluded), payment according to these prices was as fair an arrangement as could be devised consistently with a uniform rate for the whole county. To have made this the universal rule, however, would have been to disturb in certain counties a long-standing arrangement of striking two fiars, adopted without reference to ministers' stipends, and in accordance with which at that time many agricultural rents were paid. In the view of the Legislature it was better to give an advantage to the ministers in these counties rather than to disturb ancient practice. It may be a misfortune to a minister that his cure is in a county where it has not been the practice to strike more than one set of fiars prices, but it is not a grievance that only one set is struck.

113. The fiars prices referred to in the statute are those annually struck "in virtue of authority from the Sheriff or "Stewart in which the parish shall be situated." On the narrative that "the use of the Sheriff fiars is to liquidate the "price of victual in divers processes," and "that there is a "general complaint that the said fiars are struck and given "out by the Sheriffs without due care and inquiry," the Act of Sederunt of 21st December 1723 was passed enjoining various new and stringent regulations as to the manner in which this was to be done. Of the power of the Court to make this Act of Sederunt, doubts were at one time not only entertained but judicially expressed (*a*). There is now, however, no ground for doubt as to the validity of the Act, as it was

Fiars prices
struck under
A. S. 21st Dec.
1723,

(*a*) See *per curiam* in *Knox v. Law*, 1771, M. 4424, and 1 Hailes, 460; *Lewars v. Earl of Haddington*, 1725, M. 7464; *Home v. Swinton*, 1806, M. *Summary Application*, Appx. 2; and 1 Connell, *Tithes*, 432. For a further list of authorities upon the subject of fiars prices reference

may be made to Rankine on *Land Ownership*, p. 703; *Green's Encyclopædia*, *voce* *Fiars*. See also Report of General Assembly's Committee, Assembly Reports 1895, and Report of Commission upon Scottish Agricultural Prices. Cd. 1901.

CHAP. VIII.
and 29 Feb.
1729.

renewed and confirmed by another dated 29th February 1728, and has since been all but universally acted on throughout Scotland, and the authority of these Acts is assumed in 5 and 6 Will. IV. c. 46, section 15, and recognised in the proceedings before the Teind Court. In terms of these Acts of Sederunt, the monetary value of stipends modified in victual is still, save in exceptional instances, in general use to be fixed (*a*).

SECTION XXX.—*Surrender of Teinds.*

Surrender of
teinds, when
made.

114. When a titular or heritor has been, or fears that he may be, called on to contribute in payment of the minister's stipend an amount of victual which, when converted into its corresponding value at the fiars rates, will exceed the amount of his teinds as valued in money, he may assign, or, as it is technically termed, "surrender" his teinds to the minister. Surrenders of teinds are said to have been introduced into practice (*b*) in the case of Lamington in 1798 (*c*). They are expressly recognised by the 48 Geo. III. c. 138, section 14, and the Act of Sederunt 20th June 1838, and are in general use. A surrender of teinds by the heritor operates as a conveyance thereof to the minister, and thus relieves the heritor from payment of the stipend proposed to be localled on him, and from the expenses incurred after the date of the surrender in the depending or any subsequent process of locality (*d*).

Surrender
must be of
valued teinds.

115. To warrant a surrender of teinds they must be valued teinds, and a surrender of unvalued teind is incompetent (*e*). Over-payment of stipend under a decree of valua-

(*a*) The exceptional instances are the parishes within (1) the county of Haddington, as to which see cases just cited, and Howden *v.* Earl of Haddington, 1851, 13 D. 522, 23 Jur. 233; and (2) in Orkney and Shetland, to which the Act of Sederunt 14th Nov. 1816 applies.

(*b*) Per Lord Curriehill in Learmonth *v.* City of Edinburgh, 1857, 20 D. 203.

(*c*) Mitchell *v.* Douglas, 1798, M.

14,827. Here a heritor whose teinds were valued in money surrendered them to the minister when, under an augmentation modified in victual, the amount localled on him exceeded the amount of the valuation, calculated according to the average fiars prices of the preceding seven years.

(*d*) Common Agent in Locality of Eddleston, 1806, M. *Teinds*, Appx. 13.

(*e*) Per Lords Colonsay and Currie-

tion, though extending beyond the prescriptive period, does not prevent the heritor from surrendering his valued teind (*a*). A heritor having distinct valuations applicable to the teinds of two or more separate parcels of lands in the same parish may surrender the valued teinds of one of them, and retain the teinds of the other (*b*). While to this effect a surrender of teinds may be partial, every surrender must be unconditional in its terms. A heritor cannot under a conditional minute of surrender competently raise the question whether the teinds mentioned are the whole teinds of the lands therein specified (*c*). Must be unconditional.

116. Since a surrender when made operates as a discharge of all further claim for stipend out of the lands mentioned in the surrender, the minister is the party who has the most material interest to see that the proposed surrender is competent, and, if he think fit, to object to it. When the minister's objection to the surrender is rested on the ground that the valuation on which it proceeds is bad, it would appear that this objection cannot be given effect to without a reduction of the valuation unless such objection be one which appears *ex facie* of the valuation (*d*). Although the effect of a surrender by one heritor may be to increase the amount of stipend to be localled on the other heritors, the doctrine seems to be fixed that a heritor has no title to object to a surrender by a co-heritor (*e*). While instances have occurred (*f*) in which the common agent has without objection, by himself or along with the minister, opposed a surrender of teinds Objection to surrender by minister.

hill in *Learmonth v. City of Edinburgh*, *supra*, 20 D. at pp. 199 and 203; Common Agent in Locality of *Eddleston*, *supra*.

(*a*) Common Agent in Locality of *Fearn v. Munro*, 21st Nov. 1810, F.C.; *Maxwell v. Blair*, 3rd July 1816, F.C. The case of *Ramsay v. Moray*, 20th Dec. 1815, therein mentioned, is stated by the Court to have been decided on specialties.

(*b*) *Ogilvie*, 5th June 1811, F.C.

(*c*) *Richmond v. Common Agent in Locality of Orwell*, 1866, 4 M'P. 554.

(*d*) Per Lord Justice-Clerk Boyle in *Brydie v. Johnstone*, 1832, 11 S. 232.

(*e*) *Earl of Kinnoull v. Macdonald*, 1823, S.T. 54.

(*f*) Common Agent in Locality of *Fearn v. Munro*, 21st Nov. 1810, F.C.; *Richmond v. Common Agent in Locality of Orwell*, *supra*, 4 M'P. 554.

CHAP. VIII.

by one of the heritors in the locality, it may perhaps be doubted whether *he*, as representing the other heritors, has a good title to do so.

How and when
surrenders
may be made.

117. Surrenders may be made in a variety of ways, as by a suspension of a charge or threatened charge by the minister; by a notarial protest; or even by a letter to the minister (*a*). In practice surrenders are generally made by way of a minute in the process of augmentation and locality. A surrender can competently be made after the decree augmenting the stipend has been pronounced (*b*), or an interim scheme of locality prepared (*c*); but to be operative in the process the surrender must be made before the scheme of locality becomes final. When a surrender of teinds is made in the form of a minute, such minute must be signed, and on being lodged it should be ordered to be "seen," and thereafter it should be judicially approved of or sustained (*d*).

SECTION XXXI.—*Charge for Payment of Stipend.*

Statutes on
the subject
mentioned.

118. By the Act 1669, c. 6, it was provided that no suspension should be passed in time coming against, *inter alios*, ministers of the gospel of any charges at their instance for payment of stipends where they had "special decreets against" the heritors or possessors due and liable in payment thereof," except upon production of discharges or on consignation of the sums charged for. The provisions of this statute, however, did not apply where the decree on which the charge proceeded was under a locality in favour of a former incumbent without a decret conform in favour of the minister charging for payment of his stipend (*e*). By the Act 1690, c. 13, the Legislature prohibited the use of general letters of horning except for their Majesties' revenue and for ministers' stipends upon decreets of locality and for poindings of the

(*a*) See 1 Connell, Tithes, p. 532, and A. S. 20th June 1838, s. 4.

(*b*) Dalglish v. Heritors of Peebles, 1803, M. 15,714.

(*c*) A. S. 20th June 1838, ss. 3, 4.

(*d*) Magistrates of Haddington v. Kennedy, 1859, 21 D. 729.

(*e*) Rue v. Fullerton, 1682, M. 7956.

ground. By the Act 1695, c. 27, the former of the two statutes above mentioned was ratified and provision was made for the expeditious disposal of actions brought for payment of ministers' stipends. By the Act 1696, c. 14, the above rules in favour of ministers for the speedy ingathering of their stipends were extended to the rents of universities, schools, and hospitals.

119. Without distinguishing between decrees of modification and those of locality, Erskine states that charges given by ministers for their stipends cannot be suspended except on production of discharges or on consignation (*a*). It may perhaps be questioned, however, whether the phrase "special decreets," used in the Act 1669, c. 6, can correctly be said to apply to decrees of modification which are in their terms general; while the Act 1690, c. 13, is expressly limited in its application to localities. A case occurred in 1740 involving the construction of these two last-mentioned Acts, where it was held in respect of the former practice alone—the Court considering the view not warranted by the terms of the Act 1669, c. 6—that a charge upon a decree of locality, though against a person unnamed therein, could not be suspended but on consignation (*b*).

120. The privilege or right in question is personal to the minister and cannot be pleaded by his assignee (*c*). The Act 1696, c. 14, which impliedly refers to that of 1695, c. 27, has not extended to universities the right to charge upon general letters of horning, but merely the benefit of summary process for recovery of rents and debts due to them. Hence, suspension of a charge at the instance of a university on general letters of horning for payment of teind duties claimed by it as titular was passed without payment or consignation (*d*).

(*a*) Ersk. Inst. iv. 3, 19.

(*b*) M'Garroch v. Scott, 1740, Elchies, *Stipend*, 2, and Notes.

(*c*) A Minister's Executors v. Parishioners, 1697, M. 10,325.

(*d*) Pollok v. University of Glasgow, 1865, 3 M.P. 968. In this case a valuable exposition of the law on the above and other relative Acts is given by Lord Neaves.

CHAP. VIII.

It is not necessary, in order to enable a minister to use his decree of locality against the possessor of lands localled upon, that the possessor's name should appear in the locality, and a proprietor whose name appears in a locality ceases to be liable when he ceases to be proprietor (*a*).

Warrants of
charge under
A. S. 4th
March 1840.

121. Under reference to the provisions of the Personal Diligence Amendment Act, 1 and 2 Vict. c. 114, sections 1 and 8, it is enacted by Act of Sederunt 4th March 1840 that after its date decreets of locality and warrants of charge for ministers' stipends are to be issued in the form prescribed in the schedule appended to the Act of Sederunt, which contains warrant to charge the defenders to pay the stipend and communion element money localled on them respectively in ten days if within Scotland, and sixty days if furth thereof, and on default of payment within said periods respectively to arrest and pound their effects. The minister may competently raise a petitory action for his stipend instead of charging upon his locality, but he may make himself liable for expenses if he thereby occasions them unnecessarily (*b*).

SECTION XXXII.—*Right to Stipend by Prescription.*

Doctrine
stated.

122. Besides the right which is conferred on a parochial incumbent by a decree of modification of stipend under the provisions of the various statutes already mentioned a right to stipend on the part of the minister has in certain cases been recognised as established by prescription, *i.e.* in virtue of the uninterrupted payment thereof to him, or his predecessors in the cure, for forty years or upwards. The proprietor of certain burgh acres of the town of Kirkealdy was found liable *qua* heritor in his proportion of half of the stipend of the second minister in respect of payment thereof for above forty years, under a stent imposed by the town,

Kirkealdy,

(*a*) See *Jackson v. Cochrane*, 1873,
11 M'P. 475.

(*b*) *Cameron v. Chisholm Batten*,
1869, 7 M'P. 565.

although he was not resident within the town or parish, had not consented to the appointment of the second minister, and had paid his whole teinds to the first minister (*a*). In another case, use of payment for forty years by the inhabitants of a burgh of barony of an additional sum in name of stipend to the first minister seems to have been held sufficient to bind them in continued payment thereof to the incumbent of the first charge, but the case was very special (*b*). Greenock.

123. One of the most important functions of the Teind Commissions appointed in the reign of King Charles I. was the valuation of teinds throughout the country. The valuation made by the Commission fixed the amount of the teind for all time coming. The Commission was in use to appoint Sub-Commissions for different parts of the country, before which valuations were led. The valuation so made was of no final authority until approved of by the High Commission. But the obtaining of this final approval was *res merce facultatis*, the right to which could not be lost by lapse of time, and the sub-valuation might be presented for approval at any time to the High Commission, or, after 1707, to the Court of Teinds (*c*). In some cases it has happened that where a sub-valuation of this kind has been obtained but not ratified, a greater amount of stipend has been localled upon the lands in a final locality, or has been in use to be paid by the heritor to the titular, than the total value of the teind as contained in the sub-valuation. When such over-payment has been made either to the minister or to the titular without protest for a number of years (not necessarily for the prescriptive period (*d*)) in

(*a*) *Boswell v. Town of Kirkcaldy*, 1668, M. 10,890.

(*b*) *Turner v. Magistrates of Greenock*, 1757, M. 10,980. This case and that of *Boswell* in the previous note may be compared with *Baird v. Minister of Polmont*, 1832, 10 S. 752, where it is laid down that possession without title will not avail the minister. But in this latter, as in the derelinqishment cases, the cause of over-payment was error or

good feeling; there was no room to presume an immemorial right of unknown origin. See per Lord President in *Smollett v. Simpson*, 1885, 12 R. 1150; *cf.* *Traill v. Dangerfield*, 1870, 8 M.P. 579.

(*c*) *Heritors of Drymen v. Officers of State*, 1757, M. 10,675, 2 Paton, 15.

(*d*) *Gray v. Dunbar*, 1799, M. 15,773.

Valuation on a derelinqishment.

CHAP. VIII.

such circumstances as to show an intention on the part of the heritor not to stand by the sub-valuation, the sub-valuation is said to be derelinqished, and it cannot thereafter be approved of or made the rule for future payment (*a*). Derelinqishment is not inferred from payment to the titular by the heritor of an amount different from but less than the amount contained in the sub-valuation (*b*), or by payment in money when the valuation was in grain, the amount of the money paid not being appreciably greater than the money value of the grain (*c*).

Prescriptive
right to over-
payments.

124. A decree of the High Commission ratifying the report of the Sub-Commissioners cannot be derelinqished (*d*), but where over-payments have been made for the prescriptive period before the sub-valuation is approved of, although the circumstances may be such that dereliction cannot be inferred, nevertheless the minister is held to have prescribed a right to the over-payments and to be entitled to have the subsequent approbation by the High Commission limited and qualified by the prescriptive right (*e*). The theory, as explained in the case of *Colquhoun*, apparently is that the High Commission ratifies not the sub-valuation, but the sub-valuation as modified by practice, and fixes this as the value of the teinds. But the minister cannot prescribe a right to over-payments made after a decree of approbation of a sub-valuation, or either before or after a new valuation by the Court of Teinds (*f*). In order to infer dereliction it must be clear that the over-payments were made in the knowledge of the existence of

(*a*) Blairgowrie Heritors *v.* Officers of State, 1797, M. 15,771; Airlie *v.* Ogilvie, 1837, 16 S. 63.

(*b*) Heritors of Drymen *v.* Officers of State, 1757, M. 10,675; *affd.* 2 Paton, 15.

(*c*) Fergusson *v.* Gillespie, 1795, M. 15,768, *affd.* 3 Paton, 534; Smollett *v.* Simpson, 1885, 12 R. 1150.

(*d*) Maxwell *v.* Blair, 3rd July 1816, F.C.

(*e*) Common Agent of Madderty *v.* Moray, 9th July 1817, F.C. See this case, commented upon in the cases of Chisholm Batten, Colquhoun, and Minto, cited *infra*; Alexander *v.* Oswald, 1840, 3 D. 40.

(*f*) Chisholm Batten *v.* Cameron, 1873, 11 M.P. 292; Colquhoun *v.* Fogo, 1873, 11 M.P. 919; Minto *v.* Pennell, 1873, 1 R. 156.

the sub-valuation and with an intention of departing from it (*a*). The theory of the law was that the heritor by not abiding by the valuation showed that he was sensible that there was some defect in the procedure or other grounds of objection to it. These grounds may not now be traceable, but their existence is presumed from the continued effect of failure to obtain approbation and long-continued payment in excess of this sub-valuation.

125. Although for upwards of forty years the incumbent may have neglected or failed to receive payment from the heritors of a part of the stipend *modified* to him or to his predecessors, this will not relieve the heritors from liability therefor. The fact of such non-payment does not operate to cut down the minister's title as constituted by the decree of modification to the stipend therein specified. This principle is illustrated by the case of Haddington (*b*) in 1714.

Modified stipend not lost by negative prescription.

126. Here a decree modifying a certain amount of stipend was pronounced in 1650 in favour of the parish minister, which for upwards of forty years thereafter was paid by the heritors according to a scheme of voluntary allocation. In 1692 a considerable part of the parish was by decree disjoined and erected into the separate parish of Gladsmuir, whereby the stipend of the minister of Haddington was diminished by £20. This deficiency the decree of 1692 appointed to be made good out of the free teinds of the (remaining) parish of Haddington. The then incumbent, however, never demanded or received more than the proportion of stipend effeiring to the lands of which the parish of Haddington was now composed—that proportion of the stipend formerly paid to the minister out of the lands disjoined, viz. £20, being paid to the minister of Gladsmuir. In

Case of Haddington.

(*a*) *Edmonston v. Graham*, 1807, M. Appx. Teinds, No. 15; *Alexander v. Oswald*, *supra*; *Kinnoull v. Macdonald*, 1826, S. (Teinds) 105; *Richmond v. Officers of State*, 1871,

9 M.P. 1020; *Elibank v. Hart*, 1888, 15 R. 927.

(*b*) *Blantyre v. Currie*, House of Lords, 1714, Robertson, 88, not reported in Court of Session.

CHAP. VIII.

1704 a new minister was appointed to Haddington, who in 1707 brought an action of locality for localising the stipend modified to his predecessor in the cure in 1650. It was held in this action (1) that the use of payment by private paction did not bar the minister from insisting in a locality of the stipend under the decree of modification in 1650; and (2) that as the right of the minister of Haddington to the £20 of stipend had been recognised in the decree of disjunction and erection in 1692, he was entitled to have it made up, and it was sufficient to call as defenders to the action the heritors of the present parish without citing those of the disjoined area.

SECTION XXXIII.—*Reclamation of Teinds for Stipend.*

*Decime
debentur
parochio.*

127. Under the system introduced by the legislation of King Charles I., by which every parish minister is entitled to an adequate stipend out of the teinds of his own parish, the principle is firmly established that this claim of the parish minister is paramount and overrules every other claim to teinds. It is true that the earlier Teind Commissions did sometimes assign to the minister of one parish stipend out of the teinds of another parish (*a*). On what principle this was done, and whether necessarily with the assent, express or implied, of the titular, is not certainly known, but it has been judicially affirmed that those assignments were provisional, and were conditional upon there being hereafter always sufficient teind to provide an adequate stipend to the minister of the parish to which the teinds belonged (*b*). There are other cases where, by royal grant, custom, or otherwise, teinds of one parish have been assigned to the minister of another (*c*). In all such cases the same rule is applied, viz. that where the

(*a*) Connell, Tithes, p. 442 *et seq.* where a number of instances are given.

(*b*) Inverkeillor Minister *v.* Carmyllie Minister, 1902, 4 F. 719.

(*c*) Case of Dunkeld, referred to in

Teind Clerk Report, Session Papers, of Inverkeillor case: Ferguson *v.* Officers of State, 1824, S. T. 73; Morris *v.* Balcaskie, 1621, M. 15,628.

teinds of one parish have been applied in payment of the stipend due to the minister of a different parish, and to such an extent that there exists no other surplus teind in the former parish out of which an augmentation can be modified to its minister, he, on an augmentation being granted, may reclaim from the other parish the amount of teind necessary to satisfy the decree of modification. This principle is applicable although the teinds have been possessed by the minister of the other parish for upwards of forty years, and have besides been allocated to its minister by one of the Teind Commissions (*a*) or under a royal grant subsequently ratified by statute (*b*).

CHAP. VIII.

When right to reclaim arises.

Not excluded by prescription.

128. The incumbent is entitled, however, to reclaim only so much of the teind allocated to another parish as is necessary to satisfy the amount decreed for in his favour under the decree of modification (*c*)—he having no interest in the application of the teinds of that parish save in so far as these may be appropriated in payment of his own stipend. At the same time an incumbent is not precluded from reclaiming to this extent the teinds of his own parish which are allocated to another parish, although the effect of such reclamation be to reduce the stipend of the minister of the other parish to an amount which involves the imposition of an increased burden on the heritors thereof, or entitles the incumbent to claim the benefit of the Royal Bounty under the Small Stipends Acts (*d*), or deprives him of stipend which cannot be made up otherwise (*e*).

Extent of the reclamation.

129. To enable an incumbent who, in the above or similar circumstances, holds a decree of modification of stipend, to obtain a reclamation of teinds paid to the minister of another parish, it is not necessary that the former should raise a

Mode of reclamation.

(*a*) *Johnston v. Heritors of St. Cuthbert's*, 3rd March 1802, F.C., and M. 14,834; *Smith v. Hunter*, 5th March 1823, F.C. Appx. 1; *Simpson v. Ewing*, 1882, 10 R. 313; *Inverkeillor*, *cit.* note (*b*), p. 342.

(*b*) *Ferguson v. Officers of State*, 1824, S. T. 73.

(*c*) *Smith v. Hunter*, *cit.*

(*d*) *Ferguson v. Officers of State*, *cit.*

(*e*) *Inverkeillor*, *cit.* note (*b*), p. 342.

CHAP. VIII.

special action for this purpose. He may reclaim these teinds to the extent now adverted to in the course of the process of modification itself—the parties actually or possibly interested in the question, viz., the heritors and the minister of the other parish, having received intimation of the proceedings (*a*). If in addition to the proportion of teinds so sought to be reclaimed there be a sufficiency of surplus or free teind in that parish to liquidate the stipend due to the minister thereof, he may have no immediate interest to object. Such was the position of matters in the *St. Cuthbert's* case, where the minister who was called was held to be nowise concerned in the decision of the case, as there was abundance of teind unappropriated in his parish to liquidate his claim to stipend independently of the lands of Newhaven.

When reclama-
tion incompe-
tent.

130. While in the general case the right of reclamation as now explained is competent to a minister, there are two exceptions:—(1) It occasionally happens that after a stipend has been modified and localled on the teinds of a parish, part of its territory is disjoined and erected into a separate parish or annexed to another parish, and it is sometimes made a condition of such erection or annexation that a certain portion of the teinds of the disjoined lands are still to remain allocated as part of the stipend of the minister of the original parish. When such an arrangement is contained in the decree of disjunction and erection or annexation, or can be instructed to have been the footing on which it was pronounced, then the minister of the new parish will not be entitled to defeat this arrangement, even although its effect may be prejudicial to his own claim for a sufficient stipend (*b*). (2) It appears, too, that where lands have been disjoined from one parish and annexed to another the minister of the latter cannot reclaim teinds which have continued to be paid to the minister of the

(*a*) This was the course adopted in *Johnston v. Heritors of St Cuthbert's*, *supra*, M. 14,834, and in *Inverkeillor*, *cit.* p. 342, note (*b*).

(*b*) Common Agent in Locality of

Abbotshall v. Martin, 22nd Nov. 1815, F.C. See *Pennel v. Malcolm*, 1870, 7 M.P. 1078, as regards the old portion of stipend.

original parish unless there is in his parish sufficient free teind to make good the deficiency (*a*). CHAP. VIII.

SECTION XXXIV.—*Extrajudicial and collusive Augmentations.*

131. In several instances, as well before as after the Union, the Court interponed their authority to an augmentation of stipend the amount of which had been made matter of extra-judicial arrangement between the heritors on the one hand and the minister on the other. More recently, however, agreements of this description have been discountenanced by the Court, as they may involve a compromise to some extent of the real or supposed rights or claims competent to the minister or to the benefice. Extrajudicial contracts.

132. Such a transaction is quite different from any judicial consent given by the heritors to a minister's demand for an augmentation. This judicial consent is substantially unconditional in its terms. It involves no overt undertaking or agreement of any kind by the minister whereby the interests of the benefice are prejudiced, and is unlikely to be the result of any improper contract on his part. Should the Presbytery suspect the existence of an improper arrangement, they may, either on the occasion of the augmentation being asked or at any time within five months after the date of the decree of modification, enter appearance in the process (*b*) and show that the augmentation craved or granted as craved, is collusive in its nature and to the prejudice of the benefice. A case is mentioned by Connell (*c*) where, at the suit of the Presbytery and in consequence of a suspected collusive compact between the minister and the heritors, the Court modified five chalders instead of three chalders, which was the extent of the minister's demand. Judicial consent.

(*a*) Per Lord President Inglis in *Simpson v. Ewing*, 1882, 10 R. 313, and per Lord Kinnear in *Inverkeillor case*, *cit.* p. 342, note (*b*).

(*b*) In virtue of 48 Geo. III. c. 138, s. 17.

(*c*) *Minister v. Heritors of Old Meldrum*, 1811. See Connell, *Tithes*, vol. i. p. 442. Remedy against collusion.

Case of Old Meldrum.

CHAP. VIII.

SECTION XXXV.—*Retrospective effect of an Augmentation.*

General rule
and its
exceptions.

133. The general rule is that a decree of augmentation operates retrospectively to the date of the signeting of the summons. Thus a summons signeted before 15th May carries right to the whole and one signeted before 29th September (Michaelmas) to one-half of the then current year's stipend. To this general rule, however, two exceptions have been recognised, viz.—1st, when from the special circumstances of the case *bona fide* consumption of the teinds, drawn during the intervening period between the raising of the action and the date of the decree of augmentation pronounced, is instructed; and 2nd, when the minister, as pursuer of the process of augmentation and modification, is chargeable with gross *mora* in prosecuting his claim to judgment.

Illustrations.

134. On the former ground, the Court decided that the additional stipend modified became payable only as for and from the crop of the year in which the decree of augmentation was pronounced, and not from the date as at which it was demanded, in a case where the plea of *bona fide* consumption by the Professors of King's College, Aberdeen, was rested on the circumstance that the liability of college teinds for minister's stipend had only then been recently recognised—such teinds having formerly been considered as an alimentary provision for the professors (*a*). On the latter ground above stated, viz. *mora*, the Court has in certain cases refused to allow the decree of augmentation to have a retrospective effect (*b*).

Mora must be
culpable.

135. The mere length of the dependence of the process,

(*a*) *Simpson v. King's College of Aberdeen*, 7th June 1809, F.C. See *Minister of Auchterhouse v. Hay*, 1670, 1 Br. Supp. 617; and *Ferguson v. Parishioners of Kincarth*, 1671, 1 Br. Supp. 624.

(*b*) See cases of *Kinross*, in 1777, and of *Carstairs*, in 1804, both mentioned in *Simpson v. King's College of Aberdeen*, *supra*. In the

case of *Carmyllie*, decided in 1892, where the summons was raised in 1877, and was delayed owing to the opposition of a heritor, the Court allowed the augmentation to date back to 1891, when an action of declarator of the existence of free teind had been raised.—*Elliot, Teind Court Procedure*, p. 49.

however, will not prevent the operation of the rule above stated. The delay in obtaining the augmentation must be attributable to the culpable conduct of the pursuer (*a*). In one instance where the summons was dated in 1764, but decree of augmentation was not pronounced till February 1786, a retrospective operation over the intermediate twenty-two years was given to it—the delay not being attributable to *culpa* on the part of the minister (*b*).

136. According to the law prior to the Act of Sederunt of 5th July 1809, the right to demand payment of the stipend accrued to the minister under the decree of modification, and he was entitled to enforce payment of the same by a charge under such decree before any locality was adjusted after the terms specified in the decree were bygone. Hence, as was found in a case in 1805, the minister was entitled to recover from the heritors interest on the sums of stipend charged for under the decree of modification, although no locality had been settled (*c*). Here the minister obtained in 1796 an augmentation as from 1791. Having extracted the decree of modification, he charged one of the heritors for the stipend due for the preceding seven and a half years. This charge was suspended, but the letters were found orderly proceeded by a final interlocutor in 1802. In an action for payment of interest on the sums of stipend charged for, the Court found that interest was due. In the subsequent case of Stow (*d*), decided a few days before the date of the Act 48 Geo. III. c. 138, under which the above Act of Sederunt was passed, it was found by a majority of the Court that interest was due on arrears of augmented stipend from the date of the decree of

(*a*) This doctrine is clearly implied in the grounds of decision in the cases of Kinross and of Carstairs, just cited, and likewise in the case of Kettins in 1786, also mentioned in *Simpson v. King's College of Aberdeen*, *supra*.

(*b*) Case of Kettins, *supra*.

(*c*) *Anderson v. Urquhart*, 1805, M. 14,836. See also *Wright v. Kennedy*, 18th Dec. 1804, there mentioned, and foot-note, M. 14,837; and per Lord Ordinary Jeffrey in *Drummond v. Montgomerie*, 1842, 5 D. at p. 279.

(*d*) *Dawson v. Pringle*, 1808, M. *Annualrent*, Appx. 5.

Interest in
bygone
stipend.

CHAP. VIII.

augmentation to that of the final decree of locality, although no charge upon the former decree was given, or even any demand made for payment during this period (*a*). The Act of Sederunt of 5th July 1809 makes provision for the preparation of an interim scheme of locality in the process of augmentation, and until this is prepared probably no claim for payment or interest arises.

SECTION XXXVI.—*Minister's Stipend attachable for Debt.*

Attachment of
Stipend.

137. Although it appears to have been for some time a disputed matter whether a minister's stipend was or was not arrestable by his creditors (*b*), the preponderance of opinion seems all along to have been in favour of the affirmative view; and, in accordance with judgments pronounced and judicial *dicta* expressed in several cases, the doctrine may now be considered as firmly fixed, that a minister's stipend is *salvo beneficio competentie* attachable for debt at the instance of his creditors (*c*).

Stipend not
an alimentary
provision.

138. A minister's stipend is not in its nature an alimentary provision, but belongs to him *pleno jure*. Accordingly it is attachable by the diligence of creditors and by sequestration under the Bankruptcy Acts, under exception of such a portion thereof as is necessary for the minister's subsistence, and to enable him to discharge his parochial duties. To this

(*a*) In both of the cases now referred to the interest was claimed and awarded in a separate action in the Court of Session.

(*b*) See 1 Fountainhall, p. 46.

(*c*) *Smith v. Earl of Moray*, 13th Dec. 1815, F.C.; *Minister of Linton v. Creditors*, 12th Feb. 1736, cited and relied on as an authority in *Smith's* case. See also *Creditors of Hog v. Town of Edinburgh*, 1743, M. 722; and *Elchies, Stipend*, No. 5, and Notes. In this case the question was raised whether the annual-rent of a sum mortified for behoof of a lecturer in a church were arrestable. The lecturer maintained that, being of the nature of an alimentary provi-

sion, and in this respect different from a minister's stipend, they could not be arrested by his creditors. The Sheriff, however, found that these rents were arrestable, and an advocacy against his judgment was refused by the Lord Ordinary. In a reclaiming petition, the lecturer offered to assign a portion of his salary to his creditors, and on the footing of this offer the case was, under a remit to the Lord Ordinary, disposed of. Contrast this case with that of *Grierson v. Campbell*, 1768, M. 11,784, and it again with that of *Mrs. Hyndman or Cunningham*, 11th March 1818, F.C., foot-note to p. 505.

effect are the cases cited below (*a*). In the former of them the minister, after his sequestration, applied by petition to the Court to have it settled whether he was bound to assign any part of his stipend to his creditors. He was unmarried; and his then income from stipend was £195, and his available funds £600. The Court ordained him to convey to his creditors what remained after deducting £95:6:1 for his own use, £8:6:8 for communion elements, and, of consent, £7:17:6 as his contribution to the Widows' Fund. In the latter case the minister's stipend was £150, and he had a manse and glebe. His debts at the date of sequestration were £1500. On applying for his discharge at the end of the two years he offered to secure the trustee and creditors in £60 per annum for five years. His discharge was opposed by the trustee, who reported that the bankrupt had not made a "fair surrender of his estate to his creditors, and had opposed "in various ways their very reasonable demands," which were to the effect that he should assign to them £81:18s. annually of his stipend. On the ground that the petitioner had not made out a case for discharge, his petition was refused by the Court.

139. In the case of *Smith* (*b*), above mentioned, it was laid down that "ministers must assign the whole of their stipends in a cessio, unless otherwise arranged." This doctrine is, however, expressed too broadly, as the decisions cited below (*c*) imply that in cases of cessio generally, at the instance of parish ministers, the Court will authorise the clergyman to retain so much of his stipend as is in their opinion necessary as an alimentary provision to him *qua* parochial incumbent. In each of the cases referred to the benefit of a cessio was granted to an insolvent clergyman,

Must minister
assign his
whole stipend
in a cessio.

(*a*) *A. B. v. Sloan*, 1824, 3 S. 195 (n.e. 133); *Learmonth v. Paterson*, 1858, 20 D. 418. See also *A. B. Petitioner*, 1823, 2 S. 526 (n.e. 461).

(*b*) *Smith v. Earl of Moray*, 13 Dec. 1815, F.C.

(*c*) *Scott v. Macdonald*, 11th March 1818, F.C., foot-note to p. 505, affd. 1 Shaw, App. 363; *Harris v. His Creditors*, 1836, 14 S. 964; *Simpson v. Jack*, 1888, 16 R. 131.

CHAP. VIII.

not under an arrangement with his creditors, but on the condition of his assigning to them a certain proportion of his stipend as fixed by the Court. In *Scott's* case, the minister's stipend was £150, with a glebe of five acres; and he had funds amounting to about £600. His debts were £3250. He was married and had a family, his wife being entitled to the liferent of £800, exclusive of the *jus mariti*. The Court granted the minister a cessio, but only on condition of his assigning one-half of his stipend (£75) to his creditors. In the case of *Harris*, the minister's stipend was also about £150. He had a wife and seven children. His debts amounted to £1868. Here also the Court required him, as a condition of obtaining a cessio, to assign one-half of his stipend to his creditors. In the case of *Simpson*, the emoluments of an assistant and successor were £100 per annum, and the Court required him to assign £20 per annum in order to obtain the benefit of cessio. These decisions may in one view be wholesome, but they do not seem very logical. The proposition that a minister who contracts debt is to be harried to the uttermost farthing is quite intelligible. But if this view be rejected, and it be conceded that he must be allowed sufficient to maintain himself and his family, the allowances are inadequate. The idea that a clergyman can maintain himself in a suitable position and support a wife and a family of seven children upon £75 per annum is ridiculous.

SECTION XXXVII.—*Insane or Suspended Ministers—
The Belhaven Act.*

26 and 27 Vict.
c. 47, s. 2—
Insane
Ministers.

140. When a parish minister is ascertained by the Presbytery, on the certificate of the Sheriff, to be insane, the Presbytery, in default of any arrangement with those acting for the minister, may appoint an assistant minister to discharge the duties of the cure until the minister's recovery or death, and may assign to him out of the stipend from teinds

an annual allowance not exceeding one-half of the whole emoluments of the benefice, meaning thereby not merely the emoluments from the spirituality or teinds but the emoluments from the temporality—manse and glebe—which latter are to be taken into account in ascertaining the amount, one-half of which may be assigned to the assistant. Intimation of the Presbytery's deliverance to the stipend-paying heritors is equivalent to an assignation.

141. A similar provision is made for the case where a minister, as the result of a conviction under judicial procedure before the Church Courts, is suspended from the exercise of the functions of his office for a specified period. The Act contains (sections 1 and 4) certain further provisions empowering the Church Courts, *pendente processu*, to suspend a minister, and permitting evidence to be recorded in certain ways (dictation or shorthand); but these provisions were unnecessary, and indicate a failure on the part of the legislators for the time being to understand the inherent powers of the Church Courts in matters spiritual, and in the regulation of their own procedure, repeatedly affirmed by the civil Courts.

26 and 27 Vict.
c. 47, s. 3—
Suspended
Ministers.

Ibid., ss. 1
and 4—
Procedure.

CHAPTER IX.

ON MANSES.

CHAP. IX.

SECTION I.—*Manses, how provided prior to 1560.*

Manse, *quid?*

1. As originally employed, the word manse—*mansus*, or *mansio*—seems to have been used to signify exclusively, or at least principally, a portion of ground (*a*). Even after the predominant idea connected with the term came, as it ultimately did, to indicate a place of habitation or a dwelling-house, it continued to retain, and it still does retain, the subordinate idea of a piece of ground as thereto annexed. Possibly the word “mansus” is more appropriately used in the former sense, and the word “mansio” in the latter.

Introduction
of manses.

2. The introduction of manses into Scotland is attributed by Connell to the thirteenth canon of a Provincial Council held at Perth in the thirteenth century, quoted below (*b*). Beyond the information therein contained little is known regarding the rights of the Romish incumbents in connection with the erection and repair of their residences. But what is thus furnished seems sufficient to support the view that prior to 1560 neither parishioners nor heritors were liable in

(*a*) Thus Lord Kerse, in his *Law Repertorie* (MS.), p. 199, says:—
“Mansus est agri portio, modo vel
“mensura designata, fortasse a men-
“soribus qui in agrorum divisionibus
“adhibebantur sic dicta. Quidam
“duo jugera mansum efficere putant,
“alii quantum duobus bobus ad
“arrandum sufficiat. Apud nos
“vulgo mansus pro habitatione
“ministriorum sumitur, et illam
“portionem terræ quæ ab illis collitur
“glebam dicimus.” See also Skene,
De Verb. Signif. under term *Mansus*.

(*b*) This canon, entitled *De Man-*

sionibus Beneficiatorum, is as follows:—
“Statuimus etiam quod quælibet
“ecclesia mansionem aliquam prope
“ecclesiam habeat, in quam Episco-
“pus, sive Archidiaconus, honestè
“recipi valeant; quam decernimus
“infra annum debere fieri, tam
“expensis personarum quam vicari-
“orum pro rata sua portionum: sus-
“tentatio autem domorum spectat ad
“vicarium, cum habeat usum earum,
“et commodum, et ad hoc per seques-
“trationem fructuum ecclesiarum
“compellantur.”—See 3 Hailes’
Annals, 3d ed. 173.

the burden (*a*) which apparently fell to be borne by parsons or vicars as the occupants of these buildings, and for payment of which the income due from their benefices might be attached. On the eve of the Reformation the Romish parsons and vicars were naturally induced to grant feus and long leases of their manses as well as of their glebes.

SECTION II.—*Statutes providing Reformed Clergy with Manses and Glebes.*

3. With the view of securing competent manses and glebes to the Reformed clergy, the Legislature passed a series of statutes, commencing with the Act 1563, c. 72. Their general scope was on the one hand to prevent churchmen generally from granting alienations of the temporality of their benefices to the prejudice of succeeding incumbents; and, on the other hand, to provide sufficient manse and glebe accommodation for the ministers appointed to different churches. Thus, by the statute just mentioned, it was enacted that no parson, vicar, or other ecclesiastical person, should set in feu or long tack any of the manses or glebes pertaining to their churches without the special consent of the Queen in writing. On the other hand, it was enacted that the minister appointed to each church should have the principal manse of the parson or vicar, whether set in feu or tack or not; or otherwise, that a sufficient manse should be built by the parson or vicar, or the person in right of the feu or tack, with so much land for a glebe as might be thereafter appointed.

4. By the subsequent Act 1572, c. 48, it was provided that the manse, whether pertaining to the parson or vicar, which lay “maist ewest” to the church, and most commodious as a dwelling, should be appropriated to the “minister or reader;” and the quantity of ground to be assigned along with it was fixed at four acres of land at least, lying next to the manse.

(*a*) See per Lord Hailes in *Heritors of Elgin v. Troop*, 1769, 1 Hailes, 283, and M. 8508.

CHAP. IX.

Tacks and
alienations
prohibited.

The incumbent was specially prohibited from selling, feuing, setting in tack, or putting any one in possession of the manse or glebe to the prejudice of his successor. If, on the faith of a feu or tack obtained, valuable buildings had been erected on the ground, it was declared competent for the archbishop, bishop, superintendent, or commissioner of the diocese, to arrange with the feuar or tacksman to provide the minister in another equally good manse, with a determinate quantity of land adjacent thereto. If the feuar or tacksman refused to condescend on the outlay he had incurred, then he was to be removed from the manse and glebe notwithstanding the erection of buildings thereon, reserving to him a right of action against the party from whom he derived his right.

Act 1592,
c. 118.

5. The provisions contained in the two statutes now mentioned were by the Act 1592, c. 118, extended to all abbey and cathedral churches, “where (*i.e.* although) no other manse “or glebe pertaining to parson or vicar was of before,” subject to this declaration, that it should be “within the option of the “abbots, priors, and other prelates and persones whatsoever, “feuars of the said cathedral and abbey places, either to “grant a manse to the minister within the precincts of their “place, or else a sufficient manse lying as ewest and com- “modious to the parish kirk.” When either there was no glebe of old or not of the extent of four acres, the Act 1593, c. 165, provided that the designation of a glebe to the minister was to be made out of the parson’s, vicar’s, or abbot’s lands, which failing, out of the bishop’s, friar’s, or other Church lands.

Act 1593,
c. 165.

SECTION III.—*Law anent Manses and Glebes at the close of
the Sixteenth Century.*

Import of the
preceding
Acts.

6. The first of the four Acts just mentioned conferred the manse of the parson or vicar with an indeterminate quantity of ground on the Reformed minister *qua* incumbent. The second Act fixed the quantity of ground at four acres of

land lying nearest the manse, designable by the superintendent of the diocese along with two parishioners. The third Act extended these provisions to the manses and glebes of abbey and cathedral churches, although there was no parson's or vicar's manse or glebe there before. The fourth Act directed that where no glebe belonging to a churchman formerly existed, the designation of the glebe was to be made out of other Church lands in the parish. These statutes formed at the close of the sixteenth century the code of law which regulated the extent of the temporality of the minister's benefice and the manner in which it was to be provided.

7. From these provisions it appears—*1st*, that the obligation to supply the Reformed clergy with manse and glebe accommodation was imposed on parsons, vicars, and other churchmen under prelaties, or alternatively on those to whom they had conveyed their right in the temporality of the benefice; and *2nd*, that the mode in which this obligation might be discharged was either by the occupant of the benefice ceding possession of the manse and a determinate quantity of ground to the Reformed minister, or by his building a sufficient dwelling-house for the minister. The latter alternative was exigible only when compliance with the former was refused; and when it was adopted, the manse was to be a reasonable and sufficient house erected beside the kirk, or lying “ewest and commodious” thereto. A house, although built upon Kirk lands and most “ewest” to the church, could not be claimed by the minister as his manse unless it had pertained formerly to a churchman as his manse. The house required to possess this ecclesiastical character, else it was not designable to a succeeding incumbent (*a*).

Right of Reformed Clergy to claim manse and glebe.

8. On the other hand, a churchman's manse was liable to be designated to the minister even although set in feu. This rule was applied in the case of Duddingston (*b*). The pro-

When manses designable in 16th century.

(*a*) See *Rough v. Ker*, 1631, M. 5124 and 8497.

(*b*) *Monteith v. Ker*, 1632, M. 8497.

CHAP. IX.

visions of the Act 1592, c. 118, giving a minister right to a manse and glebe within the precincts of an abbey or bishop's palace, were not enforceable if either there was a parson's or vicar's manse or glebe within the parish (*a*), or when the offer was made to provide the minister with a manse outwith the said precincts not less useful and commodious (*b*). It does not appear clear that down to the close of the sixteenth century a manse had to be provided in any case in which there was not formerly either a parson's or vicar's manse, or a "place" or palace of one of the superior clergy (*c*).

SECTION IV.—*Law as to building and repairing Manses under Act 1612, c. 8.*

9. With the exception of two periods—viz. 1592 to 1606, and 1637 to 1662—a modified Episcopacy co-existed along with a modified form of Presbyterian Church government from the Reformation till 1689. It is probable that by the end of the sixteenth century all the manses which could be reclaimed under the statutes above referred to had been appropriated by the Reformed clergy, and that the number of dwelling-houses thereby supplied was inadequate, for in the following century four statutes were passed with the view of providing and maintaining sufficient manse accommodation. The first of these—viz. the Act 1612, c. 8—passed during the existence of Episcopacy,

Provisions of
1612, c. 8.

"Ordains all archbishops, bishops, and other ecclesiastical persons, to build, repair, and maintain their houses and manses in sik case as may serve for their dwelling and the dwelling of their successors, and if they, or any of them, suffers the said manses to ruin or decay in their default, the successors shall have action against their executors for the same: As also where the said houses are fallen in decay, and shall be built and repaired by any of the beneficed persons upon their own expenses, the next successor shall be obliged to give satisfaction

(*a*) Balfour v. Bishop of St. Andrews, 1605, M. 8495.

(*b*) Pittenweem v. Durie, 1612, M. 8497.

(*c*) See per Lord Westhall in Grierson v. Ewart, 1778, 2 Hailes, 799, M. 5162.

therefor to the heirs or executors of the defunct, at the sight of two or three of the bishops within the province. Providing that the said satisfaction exceed not the sum of 1000 pounds if they be prelates, and 500 merks if they be other inferior ministers."

CHAP. IX.
—

These two sums—equal to £83:6:8 sterling and £27:15:6 sterling—applied apparently to the cost of repairing as well as of building the manse, and formed the limit which the executors of a prelate or inferior incumbent respectively could recover from the next entrant in respect of the expense of either operation.

10. In this statute the building and the repairing of manses seem, so far, to be put in contrast to the maintaining of them. The concluding part of the former branch of the enactment appears to impose the burden of *maintaining* the manse—being in a state of repair—on the incumbent for the time; and in the event of his neglect to do so, to render his executors liable to the next incumbent for the loss or damage attributable to such neglect. The latter branch of the enactment—referring apparently to manses which are more or less in a ruinous condition—provides that when these are rebuilt or restored at the incumbent's own charges, the next entrant shall be liable therefor to the deceased minister's representatives to the extent specified in the Act.

Burden of
keeping
manses in
repair and of
restoring
manses.

11. Under the provisions in this statute, it was held in the case cited (*a*) that a deprived minister might resist a removal until he was paid (1) the money proved to have been expended by him on the reparation of the manse, and (2) the sum paid by him to the relict of the last deceased incumbent. Again, in the case of Inveraritie (*b*), it was held that the relict of the deceased minister might claim the price of the manse built or repaired by her late husband, either from the entrant or from the heritors. This judgment seems to proceed on the footing that although the Act 1663, c. 21,

Construction
of the Act.

Case of
Inveraritie.

(*a*) Kier v. Lamb, 1630, 1 Br. Supp. 69.

(*b*) Bowar v. Grahame, 1668, 2 Br. Supp. 435.

CHAP. IX.

which was passed prior to the action, laid the burden of building and repairing manses on the heritors, it did not thereby relieve entrant ministers from liability.

Inverkeithing,

12. From one of the findings in the case of Inverkeithing (*a*) it might seem that as at its date, 1631, a minister had it in his power either to sue the parishioners for a manse or to build one himself, the expense thereof to be recoverable by his executors from the succeeding incumbent. The latter alternative is clearly within the provisions of the Act 1612, c. 8; but it does not appear from the case cited or otherwise under what statute or rule of law the former alternative could have been enforced. Indeed the case of Curry (*b*) seems to contradict any such doctrine, for it was there found that parishioners were *not* liable for reparations on a manse which were in that instance executed prior to 1649.

SECTION V.—*Manses, how to be provided under Act 1644, c. 31.*

et 1644, c. 31.

13. The next of the four statutes is the Act 1644, c. 31, which was passed during the suppression of Episcopacy. It deals with glebes as well as manses, and confers power on

Provisions of
1644, c. 31.

“every Presbytery to design manses and glebes to ministers at every parish kirk within their several bounds, where they have not been at all designed, or not to the full quantity, or where manses and glebes are decayed or become unprofitable by inundation, sanding, or any other extraordinary accident, out of Kirk lands ewest (*i.e.* nearest) to the parish kirk, according to the order in the Act of Parliament in the year 1593 (*c*), borrowstoun kirks being always excepted; and ordains letters to pass thereupon in the same way as they passed upon the designations of bishops, or others having power to design; and further, the Estates declare, where there is no kirk lands or houses formerly belonging to parsons, vicars, or any other ecclesiastick persons within the parish, or when the same are

(*a*) *Rough v. Ker*, 1631, M. 5125, foot.

(*b*) *Charters v. Parishioners of Curry*, 1670, M. 10,165. In this case decree was granted against the heritors

for 500 merks, but this was in virtue of the obligation imposed by 1649, c. 45, to relieve entrant ministers.

(*c*) This is the Act 1593, c. 165, which deals exclusively with glebes.

mortified to universities, schools, or hospitals, it shall be lawful to design out of whatsoever other lands, or out of grass (where there is no arable land), most commodious and ewest to the parish kirks, manses, and glebes, according to the quantity contained in the former Acts of Parliament. Which designations shall have all the freedoms and privileges granted to glebes or manses, by any former Acts of Parliament, such-like as if the same were here particularly expressed. And ordains that the whole heritors of the parish contribute proportionally for making recompense to the heritors out of whose lands the said manse and glebe shall be taken *respectivè*, viz. heritors of Kirk lands, when Kirk lands are designed, and the heritors of all lands of other holding, when the designation is of other lands nor Kirk lands."

14. Of this Act, in so far as relating to manses, it may be observed in passing that borrowstoun kirks, *i.e.* purely burghal parishes (*a*), are excepted from its operation; that when a dwelling-house formerly belonging to a churchman existed in the parish, it was to be designed as a manse; that it was only when there was none such, or where, if there were, it had been mortified to a pious use, that the alternative of providing a manse otherwise arose; and, lastly, although the language of the statute is somewhat obscure on the point, that the mode in which this alternative was to be effected was rather by "taking" or appropriating a house already built—the heritors being bound to contribute proportionally in relief to the owner—than by building one at their joint expense

Construction
of the Act.

SECTION VI.—*Building and Reparation of Manses under Act 1649, c. 45.*

15. The next Act of the series is that of 1649, c. 45, also passed during the temporary suppression of Episcopacy, which provides:—

Provisions of
the Act 1649,
c. 45.

"That where competent manses are not already built, that the heritors of the parish, at the sight of three ministers and three ruling elders to be appointed by the Presbytery, build

(*a*) The word kirk is here used as meaning parish; and a burrowstoun kirk being one to which no landward

parish is attached, the construction put on the phrase in the text is arrived at.

CHAP. IX.

competent manses to their ministers, the cost and expenses thereof not exceeding 1000 pounds, and not being beneath 500 merks; and where competent manses are already built, the heritors of the parish are hereby ordained to relieve the present minister and his executors, and the entrant, of all cost, charges, and expenses, for building and repairing of the manses. Declaring hereby, that the manses being once built and repaired, or the building and repairing thereof satisfied and paid by the heritors in manner aforesaid, that neither the heritors nor the entrant shall be thereafter troubled for the same; but the said manses shall be upholden in time of vacancy of the kirk by the heritors and by the incumbent ministers during their possession; and it is hereby appointed that burghs, and the heritors of the landward parts of the parish, provide also competent dwelling-places and houses for their ministers, the sum not being above nor beneath the sums above expressed."

Construction
of the Act.

16. This Act, it will be observed, distinctly imposes on the heritors the burden of providing manses by way of building them. It fixes the maximum and minimum cost respectively of the building at £1000 and 500 merks—being sums similar in amount to those mentioned in the Act 1612, c. 8. When the manse was built and repaired and paid for by the heritors, then the cost of maintaining the building thereafter devolved on the heritors during a vacancy, and on the minister during his incumbency. Lastly, the statute imposes on burghal-landward parishes the obligation of providing manses for their ministers at an outlay not above or under the sums above mentioned.

SECTION VII.—*Code of Manse Law introduced by the Act 1663, c. 21.*

Import of the
Act 1663,
c. 21.

17. On the Restoration the Rescissory Acts 1661, cc. 9 and 15, were passed, the effect of which, strictly speaking, was to annul, *inter alia*, the statutes 1644, c. 31, and 1649, c. 45, and to reconstitute those of 1563, c. 72; 1572, c. 48; and 1592, c. 118, as the existing code of manse law, until the date of the Act 1663, c. 21. This Act consists of two parts, of which the former relates to the mode of enforcing payment

of minister's stipend. The latter part, so far as germane to the subject in hand, is in the following terms:—

“ And because notwithstanding of divers Acts of Parliament made of before, diverse ministers are not yet sufficiently provided with manses and glebes, and others do not get their manses free at their entry; therefore our Sovereign Lord, with advice foresaid, statutes and ordains that where competent manses are not already built, the heritors of the parish at the sight of the bishop of the diocese, or such ministers as he shall appoint, with two or three of the most knowing and discreet men of the parish, build competent manses to their ministers, the expenses thereof not exceeding £1000, and not being beneath 500 merks; and where competent manses are already built, ordains the heritors of the parish to relieve the minister and his executors of all cost, charges, and expenses for repairing of the foresaid manses. Declaring hereby that the manses being once built and repaired, and the building or repairing satisfied and paid by the heritors in manner foresaid, the said manses shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy out of the readiest of the vacant stipend.”

After these provisions, and others applicable to ministers' grass and glebes, the statute ends with this pointed declaration, “ that this present Act, *as to the manses*, is to have force “ as the same had been made and dated 14th March 1649 ”—being the date of the Act c. 45 of that year, already mentioned.

18. The provisions generally of the Act 1663, c. 21, were evidently intended to be, and to a considerable extent are, a repetition of those in the Acts 1644, c. 31, and 1649, c. 45. They are, however, in some respects fuller or more specific. Thus the Act 1663, c. 31, distinctly declares—what that of 1649 probably meant to do rather than did—that while a vacancy existed in the parish, the fund which the heritors were to apply in payment of the cost of maintaining the manse was the stipend accruing during this period. In another important respect the provisions in the Act 1663, c. 21—which was passed during the existence of Episcopacy—are different, for it specially commits the duty of enforcing its requirements in regard, *inter alia*, to manses, to the bishop

Distinctive provisions of 1663, c. 21.

CHAP. IX.

of the diocese or other ministers named by him. Notwithstanding this, and although by no subsequent statute have Presbyteries been invested with jurisdiction in the designation or maintenance of manses, they have for a long period—probably ever since the final abolition of Episcopacy in 1689—uninterruptedly, and without successful challenge, exercised such a right (*a*).

Theories of
Presbytery's
jurisdiction.

19. The possession of this right by Presbyteries, *quoad* manses, which undoubtedly still belongs to them, has been ascribed to them, under the Act 1663, c. 21, on one or other of the two following principles. On the one hand, it is maintained that although the right referred to has not been expressly conferred on these judicatories since the final suppression of Episcopacy, its abolition, followed by the establishment of the rival form of Church government in 1690, operated to confer on Presbyteries, as coming in place of bishops, all the jurisdiction in question conferred on bishops by the statute just mentioned; that on this footing it has been uninterruptedly exercised ever since, and is thus effectually fortified by unchallenged usage far beyond the period of prescription. On the other hand, the possession on the part of Presbyteries of this right of jurisdiction is by some ascribed directly to the statute itself. It is said, in the first place, that this Act constructively revived and re-enacted the provisions of the rescinded statutes 1644, c. 31, and 1649, c. 45, and must, on the abolition of Episcopacy and the final establishment of Presbyterianism, be held to have done so, *inter alia*, in regard to the ecclesiastical authority by whom the jurisdiction in question was to be exercised. Still further, it is maintained that this has been directly effected by the concluding declaration of the Act 1663, c. 21, above quoted, which, by antedating its operative effect—*quoad* manses at least—to the time when Presbyteries were authorised to exercise this jurisdiction, has distinctly conferred it on these

(a) See *infra*, CHAPTER XIV.

bodies. Each theory is supported by high authority (*a*); but, as they both lead to the same result, it would be needless here to examine their respective merits. It is enough to state them with the view of showing the construction which has been put on the Act 1663, c. 21, which still forms the *regula regulans* on the subject, *inter alia*, of the designation of manses and their maintenance.

SECTION VIII.—*What Classes of Parishes the Act 1663, c. 21, embraces.*

20. On a review of the terms used in the four statutes above quoted, it will be observed that their provisions refer to the ministers of three several kinds of parishes, viz. landward parishes, burghal parishes, and burghal-landward parishes. The first class of parishes, which at the dates of these Acts was by far the most common, is embraced in all of them. The second class of parishes is specially mentioned in the Act 1644, c. 31, under the term “borrowstoun kirks,” as already explained; while the third class of parishes is referred to at the close of the Act 1649, c. 45.

21. Although the Act 1663, c. 21, does not distinguish the different classes of parishes, yet in this, as in other respects, it has been treated as a re-enactment of the statutes 1644, c. 31, and 1649, c. 45, with the several provisions contained in them. On this, or a similar principle of construction, the law has been applied for more than two centuries; and the proposition may be stated as undeniable that the Act 1663, c. 21, applies to the same classes of parishes, and in the same way as do the earlier Acts (*b*).

(*a*) The former theory seems to be that adopted by Erskine, ii. 10, 56, and by Lord Justice-Clerk Boyle and Lord Glenlee in *Magistrates of Ayr v. Auld*, 1825, 4 S. 99; while the latter is adopted by Lords Robertson, Pitmilley, and Cringletie, *ibid.* See also *per curiam* in *Dunbar*, 29th June 1804, F.C.; *M. Jurisdiction*, Appx. 11.

(*b*) In *King's College of Aberdeen v. Heritors of Old Machar*, 1748, Elchies, *Manse*, No. 2, and Notes, it was pleaded by the heritors, against an assessment for repairing the manse, that it was the dean's house, and so fell not within the Act 1663, c. 21, which did not relate to the manses of the dignified clergy. While conced-

To what parishes preceding Acts apply.

How Act 1663, c. 21, construed.

CHAP. IX.

SECTION IX.—*Tenure of the Temporality of the Benefice.*

Manses and glebes, how supplied to incumbents before and after 1644.

22. The source whence parish ministers were supplied with manses and glebes from the Reformation down to the middle of the seventeenth century has been already explained. It may be assumed that there were no manses and glebes which had formerly belonged to the prelatie orders of the clergy, whether Romish or Protestant, which remained unappropriated to the various parochial incumbents at the time of the Usurpation, during which period the Acts 1644, c. 31, and 1649, c. 45, were passed, which imposed the burden of providing manses and glebes directly on the heritors. Although afterwards rescinded, these Acts were practically revived by the statute 1663, c. 21, which is now the leading enactment on the subject. While, therefore, most of the manses and glebes appropriated to the use of parish ministers prior to 1644 must have originally belonged to the Romish clergy, many of those appropriated to this purpose after that date must have been provided by the heritors of the parish. In the one case, the mode in which the minister was supplied with a manse and glebe was by dispossessing the Romish incumbent or the person in right of the subject through him. In the other case, the mode in which the parish minister was and—for this latter mode still obtains—is supplied with the accommodation in question, was and is at the expense of the heritors, and by the appropriation of ground which belonged to them.

Manses and glebes allodial.

Doctrine of Stair.

23. Without alluding particularly to the distinction now adverted to—although his remarks on the subject are not inconsistent with it—Stair attributes an allodial character to the temporality of benefices. Referring to infestments of

ing this latter proposition, the Court held, that as the minister of the parish was now a stipendiary, the provisions of the statute applied. See also the old case of *Gibson v. Hepburne*, 1673, 1 Br. Supp. 699, where, although the minister was

parson, and so in right of the whole teinds of the parish, he was found entitled to the benefit of the Act 1663, c. 21, on the ground that it applied to the manses of all ministers serving the cure, without distinction.

mortified lands, he says (*a*): "Of all these mortifications there
 "remains nothing now, except (*b*) the manses and glebes of
 "ministers, which manses and glebes are rather allodial than
 "feudal, having no express holding, *reddendo*, or renovation,
 "yet are esteemed as holden of the King in mortification;
 "and therefore the liferent of the incumbent, by being year
 "and day at the horn, falls to the King" (*c*). These observa-
 tions do not *in terminis* apply to manses and glebes desig-
 nated under the Act 1663, c. 21; but, in the absence of a more
 distinct intimation to the contrary than the passage or its
 context affords, it may be assumed that Stair intended to lay
 down the general proposition that all manses and glebes were
 allodial (*d*). Erskine expresses this doctrine without quali-
 fication, and in terms which include manses and glebes
 designated under the statute just mentioned (*e*). Bankton
 says—"It might seem that the manse and glebe hold of no
 "superior; but truly they hold of the King as other lands
 "do," and hence the liferent escheat of the incumbent, who
 is year and day at the horn, falls to the Crown (*f*).

Doctrine of
 Erskine and
 Bankton.

24. Adopting the language used by Stair, Forbes considers *Forbes*,
 that "the manses and glebes of ministers are more allodial
 "than feudal, having no express holding or *reddendo*" (*g*). In
 support of this doctrine he cites the old case of *Fletcher v.*
Irvine (*h*). Here, in a declarator of the Crown's donator of
 the liferent escheat of the parish minister (who was a rebel),
 the Bishop of St. Andrews pleaded that it belonged to him,
 in respect that the land on which the manse was built, and
 where the minister resided, lay within the regality of St.
 Andrews, and so held of him as superior. The Court, how-

(*a*) Stair, ii. 3, 40.

(*b*) Immediately after the word
 "except" there occurs, in the first
 edition of Lord Stair's work, these
 words, "the benefices of bishops,
 "deans, and chapters."

(*c*) By the Act 1572, c. 49, posses-
 sors of benefices and other ecclesi-
 astical rents tynd their liferent

thereof, being year and day at the
 horn.

(*d*) Professor More's Notes do not
 throw any light on this point.

(*e*) Ersk. ii. 3, 8.

(*f*) Bank. ii. 8, 127.

(*g*) Forbes, Tithes, p. 201.

(*h*) 1628, M. 3633.

CHAP. IX.

ever, held that manses pertaining to ministers, being given to them by laws and Acts of Parliament, ceased to be of any private holding, and could have acknowledgment of no superior but the King. On this principle the Crown's donator was preferred.

SECTION X.—*What Parish Ministers are entitled to Manses.*

Ministers of
landward
parishes.

25. As landward parishes were the ordinary class of parishes at the date of the Act 1663, c. 21, and as it was passed for the very purpose of supplying the ministers of such parishes with manses, it is scarcely necessary to say that the minister of each purely landward parish is entitled to the possession of a manse. The entire series of decisions on this branch of law proceed upon the assumption of the ministers' right in this respect.

Not ministers
of burghal
parishes.

26. From the provisions of the Act 1644, c. 31, which conferred power on Presbyteries to design manses to the ministers of parishes within their bounds, "borrowstoun" kirks were specially excepted. This phrase, as already explained, means burghal, as opposed to burghal-landward parishes. The statute 1663, c. 21, is silent on this matter. But reading the above exception in the Act 1644, c. 31, as forming part of the Act 1663, c. 21, the natural and legitimate inference seems to be, that the minister of a purely burghal parish is not entitled to demand a manse under the latter statute.

Grounds of
this inference.

27. This Act confers no power on the bishop to eject the occupants of a house for the purpose of giving it to the minister as his manse; and in a purely burghal parish there may be no unoccupied ground on which a manse could be built. Even when sufficient space exists to render this operation practicable, the value of the stance, and the price of material and labour, might be such as to increase the cost thereby imposed on the parishioners to an extent quite beyond any reasonable limit, and disproportionately greater than that

which the heritors of a landward parish would, for a similar purpose, have incurred. These and other considerations have led to the conclusion, now firmly established, that in a purely burghal parish the minister has no right to a manse (a).

28. As already observed, the Act 1649, c. 45, contains a provision the plain meaning of which is that the minister of a burghal-landward parish is to have right to a manse; and reading this statute as part of the Act 1663, c. 21, the result is that the right in question belongs to the minister of such a parish. This doctrine, which is now well-recognised law, was not formally fixed until after a considerable amount of conflicting judicial decision.

29. The first case in which the point seems to have occurred is that of Dunfermline, and here it was twice raised, first in the middle of the eighteenth century (b), and again in the beginning of the nineteenth (c). The judgment pronounced on the former occasion was adverse to the minister's claim for a manse; but on the latter the Court found that the minister

The ministers of burghal-landward parishes entitled to a manse.

Judgments on the subject.

(a) In *Heritors of Elgin v. Troop*, 1769, M. 8508, Lord Auchinleck says, 1 Hailes, p. 284—"As to a manse for 'the first minister, if the parish 'consisted altogether of a burgh, he 'would have no title;' and Lord Barjarg remarks—"Where a charge is 'a burgh charge, no manse is due." See also per Lord Pitfour. *Bankton*, ii. 8, 122, expresses a similar view. *Arbroath Magistrates v. Minister*, 1876, 10 R. 767, 20 S.L.R. 781.

(b) *Thomson v. Heritors of Dunfermline*, 1750, M. 8504; compare *ibid.* 1747, M. 11,275.

(c) *Minister v. Heritors of Dunfermline*, 1805, M. *Manse*, Appx. 1; *affd.* 1812, 5 Paton, 593. The circumstances of this case, which were very special, are these. For some time after the Reformation, the minister of the parish, which consisted of a royal burgh and a rural district, was possessed of a manse. In 1658, by which time apparently the house had become ruinous, the minister was, under an arrangement with the magistrates and heritors, allowed a fixed sum for house mail.

In 1683 he obtained a decree of modification of stipend, and which, *inter alia*, awarded him £40 Scots for house rent. After having received payment of this allowance for many years, the minister, in 1749, applied to the Presbytery to designate a manse to him in lieu thereof. When they were about to make the designation, their deliverance on the subject was advocated, and in 1750 the Court decided that the minister was not entitled to a manse by designation, "reserving 'to him to sue for a dwelling-house 'as he shall judge competent as 'accords." On this footing matters remained till 1803, when, on the application by the then incumbent, the Presbytery designated to him a manse (and glebe). This deliverance the heritors advocated, and pleaded—1st, That the judgment pronounced in 1750 was *res judicata* against the minister's claim; and 2nd, on the merits, that a minister of a burghal-landward parish was not entitled to a manse. The result was as stated in the text.

CHAP. IX.

was entitled to a manse, and on appeal this judgment was affirmed. During the period between 1750 and 1805, when these opposite judgments were pronounced, occurred the cases of Elgin (*a*), Kirkcudbright (*b*), Montrose (*c*), South Leith (*d*), and Linlithgow (*e*). In each of the four first-mentioned cases the Court held that the minister of a burghal-landward parish was *not* entitled to a manse, and these judgments were apparently rested on general principle. The decision pronounced in the case of Linlithgow was precisely the reverse, and was similar to that in the second case of Dunfermline.

Not reconcilable.

30. It is difficult, or rather impossible, to reconcile or explain these conflicting decisions. Three at least, if not all of these five cases, are substantially similar to each other, and in particular they agree in this, which was referred to as a specialty in the case of Dunfermline, viz. that the minister demanding the designation of a manse was in receipt of, or was entitled to, an annual sum as house maill in lieu of a manse (*f*); and in three of these cases at least, manses had *de facto* been attached to the cure (*g*). In the case of Irvine in 1809 (*h*), the minister of a burghal-landward parish was found entitled to a manse; but this judgment seems to have been rested on the specialty that a claim to this effect had been recognised in favour of the incumbent by a decree of the Teind Commissioners in 1650.

Right of burghal-landward ministers finally established.

31. It has been stated that the judgment in the second case of Dunfermline, as well as in the case of Linlithgow, was

(*a*) *Heritors of Elgin v. Troop*, 1769, M. 8508, and 1 Hailes, 283.

(*b*) *Mutter v. Earl of Selkirk*, 16 June 1784, M. 8513 and F.C., and 2 Hailes, 946.

(*c*) *Nisbet v. Magistrates of Montrose*, 1779.—See note to case of Elgin, *supra*, M. 8511.

(*d*) *Scot v. Earl of Moray*, *ibid.*

(*e*) *Minister v. Heritors of Linlithgow*, 1801, mentioned in note to case of Dunfermline, 1805, M. *Manse*, Appx. 1, and Connell Par. 265.

(*f*) This remark, as applicable to

the cases of Elgin, Kirkcudbright, and Linlithgow, is substantiated by a reference to the reports; while it may fairly be assumed to be correct in regard to the other two cases, from the way in which they are referred to in the note appended to the case of Elgin, M. 8511.

(*g*) Viz. in the cases of Dunfermline, Elgin, and Linlithgow.

(*h*) Connell Par. p. 271. The judgment was pronounced by Lord Ordinary Robertson, and acquiesced in.

rested on specialties, and not on the general question of law (*a*). This view seems to have been taken in the case of Ayr (*b*) by the majority of the Second Division, who, contrary to the unanimous opinion of the consulted Judges, held that the minister of a burghal-landward parish was not entitled to a manse. On appeal this judgment was reversed, and the opposite doctrine was affirmed and fixed, viz. "that the minister of a royal burgh, with a landward parish annexed, is entitled to a manse under the statute 1663, c. 21" (*c*). While this case of Ayr was under appeal, but before the judgment of reversal was pronounced, the case of Kirkwall (*d*) was decided by the Court of Session, in which they found that the minister of the parish, which was also burghal-landward, was in the special circumstances (*e*) entitled to a new manse. Referring to the interlocutor to be pronounced, it was stated from the Bench "that their Lordships were equally clear in regard to the minister's right to a manse on the general point as on specialties;" and one of the Judges (*f*), who had declined to vote in the case of Ayr, stated that he would have agreed with the consulted Judges that, independently of all specialties, the minister there was entitled to a manse. The result of the foregoing decisions is to affirm and fix the abstract doctrine that the minister of a burghal-landward parish is entitled to a manse under the Act 1663, c. 21 (*g*).

(*a*) See per Lord Succoth in *Adamson v. Paston*, 14th Feb. 1816, F.C. Indeed, unless the Court's interlocutor in the case of Dunfermline in 1805 did proceed on specialties, that pronounced by them in the case of Ayr, in 1825, was not only inconsistent with the former decision, but also with the judgment affirming it, pronounced in 1812.

(*b*) *Magistrates of Ayr v. Auld*, 1825, 4 S. 99, reversed 1827, 2 W. & S. 600.

(*c*) In the course of the argument the respondent's counsel, having maintained that the case of Dunfermline was decided on specialties, and therefore did not rule that under appeal, Sir John Leach, M.R.,

pointedly contradicted the statement and observed, 2 W. & S. 606, "I have read the papers in that case carefully, and I cannot see that it could have been decided on any other but the general point."

(*d*) *Baikie v. Logie*, 1827, 5 S. 546 and 6 S. 748.

(*e*) The specialty was that in 1639 the Presbytery had designated a house adjoining the bishop's palace, which had been possessed by the then incumbent's predecessors, "to be a perpetual manse, according to the laws of the kingdom and custom of the Church."

(*f*) Lord Alloway; see 5 S. 548.

(*g*) Thus, in *Magistrates of Elgin v. Gatherer*, 1841, 4 D. at p. 32, Lord

CHAP. IX.

The second minister of a parish is not entitled to a manse.

32. It will be observed that the proposition just stated is so expressed as to affirm the right to a manse on the part of *the, i.e. one*, minister of a burghal-landward parish. In burghal-landward parishes, however, the parochial charge is frequently collegiate. It was so in, among other cases, those of Dunfermline and Ayr; and in both instances the claim for a manse was made by the minister of the *first* charge. These cases, therefore, only affirmed the doctrine that the first minister of a burghal-landward parish, when the charge is collegiate, or the minister of such a parish where the charge is a single one, is entitled to a manse, leaving untouched the question as to the right of the second minister of such a parish in the matter.

Doctrine supported by case of Cupar.

33. Certain judicial opinions were expressed on this point in the case of Elgin (*a*); and in conformity therewith it was formally decided in the case of Cupar (*b*), where the parish was burghal-landward and the charge collegiate, that the second minister was *not* entitled to a manse (or glebe). Here the heritor, out of whose lands ground for a glebe and manse site for the second minister had been designated by the Presbytery, brought their deliverance under review by suspension. The Lord Ordinary (*c*) suspended the letters of charge *simpliciter*, and this judgment was adhered to, the ground principally relied on being, that “none of the statutes founded on by the charger apply to the case of there being two ministers in a parish, nor to the case of a royal burgh

Mackenzie says—“There can be no doubt that, in a parish partly burghal and partly landward, the heritors are liable to provide a manse. This was settled by the decisions in the cases of Dunfermline and Ayr, and must therefore be considered as a shut point.”

(*a*) Heritors of Elgin *v.* Troop, 1769, M. 8508, and 1 Hailes, 283, where Lord Auchinleck says—“It is a general regulation that ministers are to have manses; but it does not follow, if there are many ministers in a parish, each minister

“is to have a manse. I consider a second or third minister no more than an assistant, and not entitled to any manse.” Lord President Dundas remarks—“I do not think that when there are two ministers there must be two manses. The eldest minister only can be entitled to a manse.”

(*b*) Adamson *v.* Paston, 14th Feb. 1816, F.C.

(*c*) Lord Alloway, with whose reasons Lords Hermand and Succoth expressed concurrence.

“having more ministers than one, even where there is a “landward parish.” On the footing that the applicant was the minister of the *first* charge the Court, in the case of the burghal-landward parish of Brechin (a), found him entitled, notwithstanding various specialties founded on against the claim, “to a manse to be built and kept in repair at the “expense of the heritors.”

34. From the decisions and *dicta* now referred to, it appears that even when the first minister of a collegiate parish has, under the Act 1663, c. 21, right to a manse, as a general rule, and apart from specialties, the second minister of a parish, whether the parish be landward or burghal-landward, is not entitled to demand the designation of a manse under the Act 1663, c. 21, or prior relative statutes.

General rule as to collegiate charges.

SECTION XI.—*Who bound to provide and maintain Manses, and nature of the burden?*

35. Agreeing in this respect with the Acts 1644, c. 31, and 1649, c. 45, the Act 1663, c. 21, imposes on the heritors of the parish the burden of providing as well as of maintaining manses, *i.e.* originally supplying them to the minister, and thereafter keeping them in repair. These are distinct operations and will be afterwards treated of separately. But as the obligation to execute them devolves on the same class of the community, it is needless here to distinguish between them. In the case of landward parishes the persons on whom, *qua* “heritors,” the obligation in question lies are those who are possessed of the *dominium utile* of lands within the parish (b).

Obligation laid on the “heritors.”

36. While the fact of heritable ownership in fee, as opposed to liferent, is that which creates liability in the obligation in question, it is to be observed that such liability is personal

Obligation personal, not *debitum fundi*.

(a) *Carnegie v. Spied*, 1849, 11 D. 1250. See also *Panmure v. Presbytery* of Brechin, 1855, 18 D. 197, as to a glebe.

(b) See *infra*, CHAPTER XII.

CHAP. IX.

in its character, and attaches not to the lands themselves but to their proprietor. The burden is not *debitum fundi* (*a*), but a personal debt. Hence, as in the old case of Currie (*b*), it was found that singular successors are not liable for reparations on the minister's manse before they became heritors. To a like effect it is ruled by a leading case on the subject (*c*), that the party liable to the executors of a minister who had built the manse for refunding the cost thereof, and against whom the claim should be made, is the heritor for the time or his representative, not his disponee or singular successor.

37. Expressions used in one of the reports of the case of Kirkcaldy (*d*) might suggest that liability in the burden in question is limited to those heritors who occupy seats in the parish church. Such a limitation, however, is not reconcilable with the unqualified provisions of the statute 1663, c. 21, and has been directly contradicted by decision (*e*). On the other hand, the mere fact of the occupancy of seats in a parish church does not *per se* operate to impose liability for building or repairing the manse in connection with the church. This is ruled by the case of Rutherglen (*f*), where it was found that the repair of the manse is a burden on the heritors alone, from which persons owners or holders merely of seats in the parish church are exempt. A similar principle applies even where such occupancy arises from the status of parishionership. Thus, on an annexation of lands *quoad sacra* a heritor frequently comes to attend a church locally situated out of his own original parish. His liability, however, remains as before, and is confined to the manse of the original parish (*g*).

38. So inherent in the fact of heritable ownership is this

(*a*) Hamilton v. Maxwell, 1675, M. 10,166.

(*b*) Charters v. Parishioners of Currie, 1670, M. 10,165. See also to a like effect, Guthrie v. L. of Mackerston, 1672, M. 10,137, second point therein decided, 10,138. Moir v. Salton, 1694, M. 10,169.

(*c*) Blair v. Fowler, 1676, M. 10,168.

(*d*) Williamson v. Ramsay, 1685, M. 5121; see Harcarse Report, 5122.

(*e*) Park v. Maxwell, 1748, M. 8503.

(*f*) Farie v. Leitch, 2nd Feb. 1813, F.C.

(*g*) Park v. Maxwell, see *supra*, pp. 41 and 114.

Not governed
by occupancy
of parish
church.

liability, that, as in a question with the disponent of lands, it will only be excluded by express reservation to this effect. Thus, in the case of St. Leonards (*a*), it was held—on a construction of a duly confirmed grant of Church lands by the Prior to the College of St. Andrews, containing a clause of exemption from all taxes, contributions, impositions, and other burdens of whatever kind—that the grantees were, notwithstanding, liable in the burden of providing a manse (and glebe) to the minister of the parish. The burden of providing and maintaining manses is not a “public” one; and, as not excepted *per expressum* by the granter, it was held in the case of Kinross (*b*) that an exemption in a feu-charter in favour of the vassal from all *public* burdens or impositions imposed or to be imposed did not include the cost of rebuilding or repair of manses (or churches).

CHAP. IX.

Inherent
nature of the
burden.Parochial, not
public.

39. In burghal-landward parishes the persons on whom is imposed the burden in question are, *quoad* the landward district, the heritors as now explained, and, *quoad* the burghal district, either the individual heritors within it or the magistrates as representing the community. In this character the magistrates were frequently made liable, in the first instance, for the proportion of manse assessment due by the burghal district, with a right of apportionment thereof on, or relief therefrom against, the inhabitants. Thus, in the case of Lanark (*c*), it was ruled that “in a parish partly landward “and partly burghal the magistrates, as representing the “community of the burgh, are primarily liable, along with the “heritors of the proper landward district, in the expense of “maintaining a manse, and that the burden cannot be laid “directly on the individual proprietors within the burgh “territory.” The application of this doctrine was justified on the ground that the magistrates of a burgh, as opposed to the

Heritors in
burghal
districts.

(*a*) Nicoll v. Hunter, 1829, 7 S. 479.

(*c*) Lockhart v. Lockhart, 1832, 10 S. 243.

(*b*) Bruce-Carstairs v. Greig, 1773 M. 2333; affd. 3 Paton, 675.

individual proprietors, are "heritors" in the sense of the Act 1663, c. 21, and as such exclusively entitled to insist for an allocation of a share of the area of the church (*a*). On the other hand, according to the most recent authorities, where an assessment in a landward-burghal parish is imposed according to the real rent, the assessment falls to be imposed upon all the heritors in proportion to their rent, irrespective of the situation of their lands as being within burgh or without (*b*).

SECTION XII.—*Size and Accommodation of the Manse.*

Extent of
contiguous
ground and
adjuncts.

40. It has been already remarked, that even after the predominant idea connected with the term "manse" came to be that of a house rather than a portion of ground, it still retained the idea of a portion of ground in addition to or as an adjunct of the house. Accordingly a manse may be described as a building with a portion of ground thereto attached, intended for and dedicated as the place of residence of the minister of the parish and his family. The extent of the ground attached has long been recognised as about half an acre in all—including, as part of it, the site or stance of the dwelling-house and its offices. Thus in the case cited (*c*) it was *in terminis* decided that "a minister is entitled to "have half an acre of ground for the stance of his house" and offices, and "what he wants of that quantity may be "designed to him by the Presbytery out of any lands contiguous to his manse." A similar doctrine was recognised by the Court in the earlier case of Troqueer (*d*), subject possibly to this qualification, that if the minister had been long in possession of less than a half acre as manse ground—

(*a*) Per Lord Justice Clerk Boyle, *ibid.* p. 247.

(*b*) See CHAPTER XIII. where further authorities will be found.

(*c*) Anderson, 1791, M. 5152.

(*d*) Grierson v. Ewart, 1778, M. 5162 and 2 Hailes, 799, where Lord

Westhall says—"The practice has "been to set aside half an acre for "manse, garden, &c. I have never "seen such designation disputed." See also per the Lord Ordinary in Anderson v. Thomas, 1814, House of Lords, 2 Dow, 434.

he having a complete glebe of four acres—he might not be entitled to claim additional manse ground. Besides the dwelling-house itself, a stable, barn, byre, and garden are recognised as part or as legitimate adjuncts of the manse (*a*).

41. What the required extent or size of the manse itself is cannot be stated definitely, *i.e.* either by reference to measurement or to the number of apartments which it should contain. All that the statute says on the subject is, that the manse must be “sufficient,” *i.e.* fit or adapted as a place of residence for the parish clergyman. The fitness or adaptation of a building as a residence for the members of a particular class of the community is to a great extent dependent on their recognised social position, wants, and tastes. These in the course of time gradually become more numerous, refined, and artificial, so that what are regarded as luxuries in one age are deemed necessities in the next. In deciding what is *now* a sufficient manse, the Court has given effect to this principle; and the tendency of modern judicial practice is to authorise a very considerably increased amount of accommodation in connection with manses, beyond that which was formerly deemed suitable and sufficient for persons occupying the social position of parish clergymen (*b*).

42. Accordingly the Court is inclined not only to increase the extent, but also the kind of accommodation with which a manse is to be supplied (*c*). Thus dressing-rooms, servants’ bedrooms, water-closets, laundries, pantries, larders, and sculleries have been required to be provided on the occasion of a manse being enlarged or rebuilt (*d*). In the same way, the number of the out-door offices supplied has been increased

(*a*) Anderson, *supra*, and Ersk. ii. 10, 57.

(*b*) See per Lord Ordinary Ivory in *Carnegie v. Spied*, 1849, 11 D. 1250, who, p. 1255, “Doubts how far (the ‘heritors’) would ultimately succeed ‘at law in an attempt to restrict or ‘limit the minister’s right to a ‘manse of any lower description

“*than what, according to the progress of the times, would now be considered reasonably to answer that ‘character.*” See also per Lord Kinloch, as quoted at p. 402.

(*c*) See *infra*, Sect. XVIII.

(*d*) See *Heritors of Balforn v. Niven*, 1863, 1 M’P. 324.

How estimated now.

Measure of accommodation.

by such accommodations as these—washing-houses, poultry-houses, pig-styes, garden walls, and a force-pump for introducing water into the manse (*a*).

43. Of these several accompaniments of the manse, the one which is the least immediately connected with domestic accommodation is the garden wall. No mention is made either of a garden wall or of a garden in any of the Acts relative to manses. It was, however, natural to assume that, of the half acre recognised as the extent of manse ground, the portion of it not occupied as the stance of the house and offices should, when adapted for the purpose, be devoted to use as a garden for supplying the minister's family with vegetables and fruit. This point being reached, and it being generally necessary to the beneficial use of a garden that it be enclosed, an enclosure came to be treated and dealt with in law as constructively forming part of the garden, and the heritors have in repeated instances been ordained to furnish a garden wall.

Cases on
this point.

44. Thus the minister was found entitled to a garden wall built of stone and lime in the cases of Linlithgow, Muckart, and Dalmeny; to a drystone dyke in the case of Bottriphnie in 1805; and in the cases of Edzel and Kirkconnell to “a garden dyke five feet high, exclusive of coping, built dry in the middle, teathed with lime on both sides, and coped with lime and small stones mixed” (*b*). In the case of Half-Morton (*c*), where the Presbytery decerned against the heritors in the sum of £147 for a stone and lime manse garden wall, one of the heritors suspended, and, *inter alia*, averred that a

(*a*) See *Mackenzie v. Mackenzie*, 1833, 12 S. 151, 13 S. 1014; *Car-michael v. M'Lean*, 1837, 15 S. 1020; and *Heritors of Balfron v. Niven*, *supra*, 1 M'P. 324; and *Earl of Glas-gow v. Murray*, 1868, 7 M'P. 6.

(*b*) *Connell Par.* p. 293. As to the case of *Kirkconnell*, viz. *Duke of Queensberry v. Richardson*, 3rd Dec. 1808, *Connell* observes that the

judgment there proceeded mainly on the ground that the wall had been approved of by a considerable number of the heritors.

(*c*) *Maxwell v. Presbytery of Langholm*, 1867, 40 Jur. 13, 5 S.L.R. 16. Lord Ordinary *Barcaple*. See also *Elliott v. Hunter*, 1867, 5 M'P. 1028.

stone wall was not necessary to protect the garden from injury; that a hedge was a sufficient and the usual kind of garden enclosure in that part of the country. Without a proof—which was waived by the suspender—the Lord Ordinary (whose judgment was acquiesced in) found that the minister was entitled to have his manse garden enclosed with a *wall*. In the absence of statutory requirement on the subject, the kind of wall, both as regards material and height, will possibly be dependent on what description of enclosure is requisite to secure to the minister the beneficial use and enjoyment of the garden, and protect it against ordinary sources of injury or encroachment. As to kind of wall.

45. Agreeably to the modern standard of social comfort and domestic requirement, a dwelling-house to be “sufficient” Qualities of a sufficient manse. *qua* manse, *i.e.* suitable as the residence of the parish minister, ought in point of situation to be in a healthy locality; in point of construction, to be well built and thoroughly drained; and in point of accommodation, to be of such a size as to enable him to live comfortably in it (on the assumption that he is married and has a family), and to entertain visitors to a moderate extent (*a*).

SECTION XIII.—*Heritors' liability for the cost of a new Manse.*

46. As has already been explained, from the Reformation to the close of the sixteenth century parish ministers and readers were supplied with manses by the appropriation of those belonging to the prelatical incumbents. Subsequently, law enjoined or at least authorised the incumbent to build the manse himself, conferring on his executors a right of What, and how liquidated under 1612, c. 8.

(*a*) Referring to the propriety of the manse being sufficient to enable the clergyman to entertain his brother clergymen on sacramental occasions, Lord Balgray says, in the case of *Strathblane Heritors v. Hamilton*, 5 S. 913: “I think also that there

“must be an addition built to the
“manse, for it is quite insufficient
“for the accommodation of a clergy-
“man with his family, and for those
“who must necessarily reside in the
“house on occasion of dispensing the
“sacrament.”

CHAP. IX.

How under
1663, c. 21.

Extent of
liability
under 1663,
c. 21.

relief for the cost against the succeeding incumbent to the extent of a certain monetary limit, according to the rank of the ecclesiastical person who built it, viz. £1000 Scots if he were a prelate, and 500 merks if an inferior minister (*a*). This method of providing manses was superseded by that introduced by the Act 1649, c. 45 (*b*), and confirmed by that of 1663, c. 21, which declares that, when competent manses are not already built, the heritors of the parish “build competent manses to their ministers, the expenses thereof not exceeding 1000 pounds (Scots), and not being beneath 500 merks,” *i.e.* £83:6:8 and £27:15:6 sterling respectively.

47. From this it must be assumed that it was possible, in 1663, to build a competent manse, according to the meaning then put on the expression, at an outlay of £1000 Scots. The cases of Lochmaben (*c*) and of Old Machar (*d*) may also perhaps imply the possibility of so doing in 1712, and down to 1748. In the former instance the minister who wanted a manse applied to the Presbytery, and obtained their decret against the heritors to build him one. In a suspension of this decree, the Court, *inter alia*, “found the ministers were, “by our law, empowered to proceed to liquidate the value “and price of the manse, *not exceeding* £1000 Scots, and like- “wise to chuse the most convenient place for its situation “near the church,” &c. In the latter case the Court found that the minister of Old Machar, having become a stipendiary, the Act 1663, c. 21, applied to the manse of the parish, and the same being ruinous, that the heritors might either repair the old manse or build a new one worth £1000 Scots.

48. It is evident, however, that no “competent” manse,

(*a*) See the Act 1612, c. 8. The claim made in *Charters v. Parishioners of Currie*, 1670, M. 10,165, though rested apparently on the Act 1663, c. 21, by the pursuer, was probably sustained to the extent of 500 merks, under the provisions of the Act 1612, c. 8.

(*b*) The Act 1644, c. 31, is omitted,

because it may be doubted if this statute distinctively enjoined the *building* of manses.

(*c*) *Steel v. His Parishioners*, 1712, M. 5131 and 8498.

(*d*) *King's College of Aberdeen v. Heritors of Old Machar*, 1748, *Elchies, Manse*, 2, and Notes.

according to the meaning now attached to this expression, and indeed no dwelling-house, could at the present day be built for such a sum as £83 sterling. Hence the question occurs, what effect this impossibility has on the construction to be put on the limitation clause in the Act 1663, c. 21. As the obligation on the heritors to build a manse is entirely the creation of statute, it may plausibly be argued that the extent of their liability cannot exceed that stated in the Act; and in Mr. Duncan's view it was a more legitimate and reasonable, though a less convenient construction, to read the relative and indefinite term "competent" as a subordinate expression, than as one which controls, or rather contradicts, the effect, and indeed ignores the existence of the distinct and unambiguous declaration that the sum of £1000 Scots is the limit of the heritors' liability. The difficulty now alluded to in the construction of the Act has repeatedly occurred for disposal, but, if the case of Lochmaben be excepted (*a*), hitherto only in connection with the rebuilding of old manses.

49. The first reported case on this subject apparently is that of Inverury (*b*). Here one of the heritors brought a suspension of the Presbytery's decree for a new manse on, *inter alia*, the special ground that the cost of its erection would exceed £1000 Scots. The suspender judicially offered to pay his proportion of the expense of the building to this amount. This offer was rejected by the minister and Presbytery, who contended that the former was entitled to a "*sufficient*" manse irrespective of any monetary limit. Thereafter the Lord Ordinary (Coalston) ordained the heritors to build a "*competent*" manse, and to give in a plan of such. After certain steps of procedure the Court ultimately pronounced a judgment ordaining the heritors to build a manse at a cost of £2000 Scots.

(*a*) The inference deducible from the report of this case (M. 5131) is, that the demand here made was for an original manse—no manse having formerly existed in the parish.

(*b*) Minister of Inverury *v.* Leith, 1760, not reported. See Connell Par. 278, and 3 Bligh, 94. This was a case of *re*-building an old manse.

CHAP. IX.

Case of
Lethendy.

50. The next case on the subject is that of Lethendy (*a*). Here the Presbytery, on the application of the minister, ordained the heritors to build a new manse in lieu of the old one, at a cost of £210 sterling. Mercer, the principal heritor, brought this deliverance under review of the Court on the ground that the price was exorbitant, but he did not then plead the statutory limitation of £1000 Scots. The Court ultimately ordained the heritors to build a manse of the value of £195:10s. Against this judgment Mercer appealed to the House of Lords, and there, for the first time, pleaded the statutory limitation. The judgment, however, was affirmed, the reason of the affirmance being, as stated by the reporter, that "the Court of Session had gone according to the spirit " of the statute, and according to many former decisions."

Construction
adopted in the
two cases
cited.

51. The construction put on the Act 1663, c. 21, in those two cases is to the effect that, as the statute has enjoined *competent* manses to be built, the monetary limit of liability adjoined to this provision is to be ignored whenever its adoption is incompatible with the erection of such manses. This construction is alluded to in the case of Dunbar (*b*), and, apparently with approbation, by a Judge of the highest authority in this branch of the law. If it be the sound construction, the result seems to be that when heritors are called on to build a manse in a parish for the first time they are liable in the expense incurred in building a *sufficient* manse, just as if the clause expressly limiting the liability to £1000 Scots did not occur.

Different
construction
in case of
Aberdour.

52. This mode of reading the statute is perhaps open to objection, and a different ground of judgment has, in the more recent cases on the subject, been adopted and applied both by the Court of Session and the House of Lords. In the case of

(*a*) Mercer *v.* Williamson, 1786, 3 Paton, 43, and 3 Bligh, 90, not reported in Court of Session.

(*b*) Carfrae *v.* Heritors of Dunbar, 13th May 1814, F.C. Here Lord Robertson says — "The minister's

" argument with regard to manses
" is not altogether applicable, because
" it is declared by the statute in
" question that *competent* manses
" shall be provided."

Aberdour (*a*), where the manse was ruinous, the Presbytery ordained the heritors to rebuild it, and decerned against them for £1214:14:10 sterling. In a suspension, the Lord Ordinary (Pitmilly) remitted to an architect, with instructions to adopt one or other of two different proposed plans, the expense not to exceed £1000 sterling. Against this interlocutor the suspender reclaimed, and pleaded the statutory limitation of £1000 Scots. As this plea had not been urged before the Lord Ordinary the case was sent back to him. Thereafter his Lordship repeated his former interlocutor (*b*), remitting to the architect; and to this the Court adhered. On appeal the suspender maintained (1) that the Act 1663, c. 21, did not authorise the *re*-building of manses, but merely their original erection and subsequent repair; and (2) that in any view he could not be made liable beyond the £1000 Scots. The House of Lords found "that this case ought to be conducted as falling within the meaning of that clause in the statute 1663, c. 21, which relates to the *repairing* of manses, and *not* within the clause which relates to the *building* of manses, *where manses had not been then already built*," and pronounced a judgment of affirmance.

53. The subsequent case of Elgin (*c*) is to a similar effect. *Case of Elgin*. Here, although a manse had once existed in the parish, it had been burned down upwards of 140 years prior to the action,

(*a*) *Dingwall v. Gardiner*, 27th Nov. 1816, F.C., affd. 1821, 3 Bligh, 72, and 1 Shaw, App. 10. In the case of Elgin, *infra*, Lord Fullerton says, 4 D. 34, that the question in the Aberdour case "was as to the building of an entirely new manse in place of one which had become ruinous;" but his Lordship is in error. The question related to *re*-building the ruinous manse.—See Reports of the case, *ut supra*.

(*b*) In doing so, and thereby repelling the suspender's plea, he specially referred to and relied on the case of Inverury, *supra*.

(*c*) Magistrates of Elgin *v. Gatherer*, 1841, 4 D. 25. Here the ground of

judgment in the previous case of Aberdour is thus stated by Lord Mackenzie, 4 D. 32:—"This Court rather held that the statute was modified by custom, that the first provision as to the building of a manse was in force, but that the clause as to the limitation of the sum to be expended was in desuetude. The House of Lords did not adopt that view, but another, namely, that wherever a manse had once existed the keeping up of it must be considered as repairs, and the expense of such repairs fell under the second clause, in which there is no limitation."

and its existence at that date was ignored by the incumbents, who applied to the Presbytery for the designation of a manse. This was awarded and a manse ordered to be built at the cost of £990:12s. sterling. In a suspension of this deliverance the suspenders pleaded the statutory limitation of £1000 Scots. On the authority of the case of Aberdour, and on the same ground as there adopted, the Court repelled the defence, it being remarked from the Bench that "although the manse " be utterly ruinous, and there be not even a trace of its " foundation, yet, under the second branch of the statute, " which authorises a manse to be properly repaired (*a*), we " may allow the full sum necessary " (*b*).

Ratio decidendi in cases of Aberdour and Elgin.

54. It is plain that the *ratio decidendi* in the two cases last mentioned is quite different from that adopted by the Court of Session in those of Inverury and Lethendy, and ascribed to the House of Lords in the former case; and, in the circumstances, may possibly be held to amount to an implied repudiation of the doctrine therein expressed (*c*). At all events neither the case of Aberdour nor that of Elgin supports the view that the heritors of a parish are liable beyond the limit of £1000 Scots for the expense of building a manse in a parish where no manse previously existed. On the whole, this point may perhaps be considered as still open, but it is thought that should the question ever arise, the limitation of the amount to £1000 Scots would be found not to apply even in the case of a manse where none had previously existed.

(*a*) Without mentioning any monetary limit.

(*b*) Per Lord President Boyle, 4 D. 32.

(*c*) Referring to the cases of Aberdour and Elgin, it may here be remarked that the principle on which the ingenious construction of the Act was there rested is distinctly repudiated by the Court in certain

old cases, where the attempt was made, but without success, to apply, under the terms of the Act 1663, c. 21, vacant stipend to *re-build* an old manse, on the ground that this was merely *repairing* it.—See Moncrieff *v.* Couper, 1729, M. 8502; King's College of Aberdeen *v.* Heritors of New Machar, 1734, M. 8503; Woodrow *v.* Cunningham, 1740, M. 8503.

SECTION XIV.—*Minister's liability to repair the Manse—
Free Manse.*

CHAP. IX.

55. After a *competent* manse has been built or repaired at the expense of the heritors, the Act 1663, c. 21, declares that it shall thereafter be *upholden* by the minister during his possession, *i.e.* of the manse; or, in other words, during his incumbency (*a*). The emergence of this obligation on his part occurs when he is put in possession of a *competent*, or, as it is sometimes styled, a “legal,” oftener a “sufficient,” and still more frequently a “free” manse—which last expression is now the usual one. The extent of the obligation so devolving on the minister is to *uphold* the manse.

Minister bound to uphold a “free” manse.

56. This term, as used in the Act, seems to point at and be limited to repairs which are necessary to *keep* a building in an existing condition, as opposed to such as *put* it in a better condition than that in which it was at the time. The former are ordinary repairs; the latter are extraordinary repairs, and tend in the direction of meliorations or renovations. The replacement of any of those parts of the manse which go to form its fabric—such as the floors, walls, joisting, heavy woodwork, or roof—by the substitution of new materials of better quality, implies more or less an *improvement* in the condition of the building. Again, the replacement of any such parts of the fabric—they being in a state of decay or deterioration—by the substitution of new materials equal to the original quality of those removed, involves a *renovation*, or *renewal*, more or less extensive, of the building. In both these instances the supposed operations imply something more than “upholding” the manse. In the former case they amount to an actual improvement of the building, and in the latter to a constructive, though it may be but a partial, renewal of its fabric.

Obligation to uphold, *quid?*

57. The statute, however, does not require the incumbent

Import of the obligation.

(*a*) The Act 1649, c. 45, contains a substantially similar provision.

CHAP. IX.

to *improve* or *renew* any part of the manse. Thus, in the case of New Machar (*a*) the Court held that slating the roof of a manse which had formerly been thatched, the operation having been executed during a vacancy, was to a certain extent a melioration, and that, *in so far as it was so*, the expense incurred could not be defrayed out of the vacant stipend, but must be paid by the heritors (*b*). The execution of repairs rendered necessary by the inevitable decay of the building, as resulting from the action of the weather or the inroads of time, does not appear to fall on the incumbent, although in possession of a "free manse," but on the heritors. This view is adopted by Erskine (*c*), and seems to be supported by the *dicta* of Lord Eldon in the case of Strathaven (*d*). A similar remark probably applies to injury caused to the manse by a *damnum fatale*, such as lightning, an accidental fire, a tempest, or the like. In such instances the manse repairs involve more or less a *reconstruction*, and so fall on the heritors under the statutory obligation laid on them to build "competent" manses to parish ministers." On the other hand, when the manse has been declared a free manse, the heritors cannot be compelled to make good deficiencies and inconveniences not resulting either from lapse of time or a *damnum fatale*.

58. In a word, the repairs which a minister occupying a "free manse" must execute on it seem limited substantially, or nearly so, to the reparation of the ordinary wear and tear of the building consequent on or immediately connected with

Result
deducible
therefrom.

(*a*) King's College of Aberdeen v. Heritors of New Machar, *supra*, M. 8503.

(*b*) This case is in point, as the burden in connection with the reparation of manses formerly laid on the vacant stipend is precisely similar to that now imposed on the minister during his incumbency—viz. "upholding" the manse.

(*c*) Ersk. ii. 10, 58, see last sentence. In support apparently of the doctrine here stated, Ivory in a note refers to the case of Botriphnie, 1805. See

Connell Par. p. 309-14; and 1 Dow, 399, 400. Here, however, the manse had not been declared "free."

(*d*) Duke of Hamilton v. Scott, not reported in Court of Session, House of Lords, 1813, 5 Paton, 745; 3 Bligh, 88, foot-note; and 1 Dow, 393, where, p. 401, Lord Eldon says—"If Dr. Scott had a free manse there could be no dispute about repairs, as the heritors could only be called on for those repairs which were rendered necessary by the waste of time."

his occupancy of it. The minister is tenant during his incumbency, and while, *qua* tenant, he is entitled to obtain possession of a "competent," and in all respects a tenantable house, he is thereafter bound by the statute to "uphold" it in this condition, by executing thereon from time to time such repairs as are necessary to make good the partial deterioration of its condition so far as caused by or consequent upon his use or occupancy of the manse. As the obligation in question is statutory, and applies to "manses" only, it does not render a minister liable to uphold a house, though occupied by him, which does not come within the category of a "manse" (*a*). In such a case his obligation in the matter will be regulated by contract or the principles of common law.

SECTION XV.—Decree of "*Free Manse*."

59. The term "free," which, as well as that of "competent," occurs in the Act 1663, c. 21, is not used in any of the prior statutes anent manses. The expression employed in the immediately preceding Act 1649, c. 45, is "competent;" in that of 1592, c. 118, "sufficient;" while in that of 1572, c. 48, the designative phrases introduced in connection with the dwellings to be provided for "ministers or readers" are "reasonable," and "sufficient," and "commodious." From this, in connection with the expressions "free" and "competent," as these are made use of in the Act 1663, c. 21, it seems reasonable to infer that the legal meaning attachable to them is twofold—implying, 1st, that *quoad* its structural condition the manse is in a complete state of repair; and 2nd, that *quoad* its size and accommodation it is "commodious,"

(*a*) Referring to "proper manses," the reporter (Kilkerran) mentions in *M'Aulay v. Auchinleck*, 1751, M. 8506, as having been in that case observed on the Bench, "that unless a minister is proved to have got a sufficient manse (which by custom is commonly ascertained

"by its being declared a legal manse
"by the Presbytery, which at the
"same time is not a necessary
"requisite by law, but is only introduced by custom for more certainty), he is under no obligation to repair."

CHAP. IX.

or "sufficient," or suitable as a place of residence for the incumbent.

*Dicta in
regard to*

"free manse."

60. Erskine seems to assume such a construction in the passage cited below (*a*), where commodiousness is united to another quality, viz. sufficiency of repair, and the co-existence of both qualities is presupposed before the burden of upholding the structure is laid on the minister. Lord Eldon seems also to adopt this construction when, referring to the terms "sufficient," "commodious," and "reasonable," occurring in the various Acts anent manses and glebes (*b*), he says, "but these words were used as applicable to the *size* of the house and acres, and not to the *quality* of the house as to repairs. He found nothing in them on the subject of repairs" (*c*). These remarks, read in connection with the judgment pronounced, indicate that, in his Lordship's opinion, a condition of "free manse" implied both suitable accommodation and proper repair; and this view is supported by the general bearing of the judicial *dicta* in the case of Channelkirk (*d*).

Sufficiency
of repair,
quid?

61. The second quality above mentioned, viz. sufficiency of repair, implies not only that the fabric of the building is wind and water tight, but also that the internal parts and fittings of the house, including windows, shutters, skirting boards, doors, and plaster-work are all complete and of sound—as opposed to decayed or decaying—material. Elegance of design or finish is not essential; but completeness of finish (*e*), together with sound material, seem to be so, inas-

(*a*) Ersk. ii. 10, 58, where in describing the mode of declaring a manse "free," he says,—“The incumbent, who at his entry is entitled to a commodious manse in sufficient repair, applies to the Presbytery,” &c.

(*b*) These Acts are 1563, c. 72; 1572, c. 48; 1592, c. 118.

(*c*) See Duke of Hamilton v. Scott, *supra*, 1 Dow, 402, top.

(*d*) Shiells v. Heritors of Channelkirk, 1818, 13 S. 1018. See particularly per Lords Robertson and Craigie, pp. 1019 and 1020.

(*e*) It does not seem to have been decided to what extent the heritors are bound to paint and paper the rooms of the manse. In a case which came under Mr. Duncan's notice, but was undisposed of on this point, it was maintained on behalf of the heritors that painting and papering the rooms of the manse generally did not fall within that state of repair which was implied in a "free manse," and that the minister must be at the sole expense of such embellishments. The interlocutor by Lord Meadowbank in the case of Kirkliston, quoted in

much as it is only through their co-existence that dilapidation, other than that consequent on decay through time, can be prevented. The repair of such dilapidation ought to fall on the heritors, and not on the minister, even in the case of a "free manse." But the reverse would, to some extent, almost certainly occur if an incumbent were compelled to "uphold" a structure which was to any extent in an unfinished or decaying condition when his occupancy of it commenced.

62. As the burden of "upholding" the manse when "free" is statutory, and probably would not at common law attach to stipendiary incumbents, such as ministers now are, it is necessary, in order to render a minister liable in this obligation, that it be clearly shown that the manse is of this character. While the statute does not direct, and law does not absolutely require, that the fact be established in any one particular form exclusively, custom, for the sake of convenience and certainty in the matter, sanctioned as the usual and formal evidence on the subject a deliverance to this effect by the Presbytery of the bounds, technically termed a decree of "free manse" (*a*). Such a decree is sometimes contained in the Presbytery's deliverance on a visitation by them of the manse made at the minister's request at his induction (*b*); but it may also be pronounced on the special application of the heritors (*c*).

63. An important change in the law in regard to the declaration of "free manse" by the Ecclesiastical Buildings and Glebes Act, 1868 (*d*), which provides (section 12):—

Decree of
"free manse."

Decree of "free
manse" by the
Sheriff.

15 S. 1025, declares that the minister "has a right to have a substantial dwelling, not unsuitable to the revenue of the benefice, *decently and comfortably furnished without and within.*" There can, it is thought, be no doubt that it would be held that the heritors must paper and paint the manse, so far as required, on the incumbent's entry, but after a decree of free manse they would not be bound to renew the paint or the paper.

(*a*) See *per curiam* in *M'Aulay v. Auchinleck*, 1751, M. 8507.

(*b*) *Ersk.* ii. 10, 58.

(*c*) *Heritors of Cairney v. Presbytery of Strathbogie*, 1786, M. 8514. In *Shiells v. Heritors of Channellkirk*, 1818, 13 S. 1018, Lord Robertson says, p. 1020,— "Has been declared that when manse built by heritors, Presbytery cannot refuse to inspect and declare it free;" but this was before the Act of 1868, under which the Sheriff may pronounce decree.

(*d*) 31 and 32 Vict. c. 96.

“After the completion of the works ordered in the course of any proceedings for the building, rebuilding, or repairing of any manse, it shall be competent for any heritor of the parish to move the Sheriff to declare it a “free manse ;” and if the Sheriff shall be satisfied that the manse is in a state of thorough repair he shall find and declare accordingly, and his decree shall have the same force and effect as a decree in similar terms pronounced by a Presbytery before the passing of this Act would have had : Provided always, that such decree shall have effect only till the expiration of fifteen years from its date, or until the appointment of a new minister to the parish, whichever event shall first happen.”

It will be observed that whereas a decree of the Presbytery operates (except it may be in special circumstances, such as a very long incumbency) during the whole incumbency, the effect of a decree by the Sheriff is limited to fifteen years. In these circumstances it seems that it would now be impolitic for the Presbytery, in the interest of the incumbent, to pronounce a decree of free manse. By insisting that the heritors if they desire such a decree shall go to the Sheriff, the Presbytery limit the obligation of the incumbent and the exemption of the heritors to fifteen years.

How decree
expressed.

64. Although the word “sufficient” or “competent” was sometimes employed by the Presbytery in their decree or declaratory finding, the proper, and when the decree is made under the statute last mentioned the necessary expression to adopt is undoubtedly that of “free.” This expression has now a fixed technical meaning, while the term “sufficient” in particular is susceptible of, and has in point of fact received a different interpretation, as in the cases of Botriphnie (*a*) and Strathaven (*b*). In the former case, after the heritors had been ordained by decree of the Presbytery to repair the manse, they voluntarily undertook the heavier burden of building a new manse and offices altogether, which, when

(*a*) Heritors *v.* Minister of Botriphnie, 1805. See Connell Par. p. 309, and 1 Dow, 399.

(*b*) Duke of Hamilton *v.* Scott, not

reported in Court of Session, House of Lords, 1813, 5 Paton, 745, 1 Dow, 393, and 3 Bligh, 88, foot-note.

completed in 1778, they requested the Presbytery to inspect. This the Presbytery did, and thereupon pronounced a formal deliverance, quoted below (*a*). In 1804 the Presbytery, on the minister's application, and in respect the manse was in a state of disrepair, gave decree against the heritors for £120 for repairing it. In a suspension of this deliverance, the heritors pleaded the decree in 1778 as a decree of "free manse," and on this footing insisted that the repairs which had become necessary in the meantime should be executed by the minister. The Court, however, repelled this plea, holding that the above deliverance did not amount to a declaratory finding of a "free manse" (*b*).

CHAP. IX.

Case of
Botriphnie.

65. In the case of Strathaven, after the manse was repaired, the Presbytery, by a decree in 1790, *inter alia*, found that "the manse of this parish and its offices are "sufficient," on certain specified deficiencies being made good. In 1803 and 1809 the Presbytery decerned against the heritors for £48, and £95 for additional repairs. In a suspension, the heritors pleaded the deliverance in 1790 as amounting to a decree of "free manse," and so excluding liability. The Court, however, found in the circumstances "that the manse in question is not a free manse in terms of "law," and repelled the reasons of suspension; and on appeal this decision was affirmed. While it rather appears that this judgment proceeded partly on the ground that the repairs demanded by the minister did not fall within the category of those implied in "upholding" the building, it is yet clear that Lord Eldon's remarks amount to this, that a finding by the

(*a*) 8th Oct. 1778.—"The Presbytery having considered the accommodations of manse and office houses erected by the heritors for the minister of Botriphnie, judged them *sufficient* accommodation for Mr. Angus and his successors in office; and, therefore, they did assolve the heritors of the parish of Botriphnie from a decree of

"repairs of the old manse and office-houses formerly pronounced by them, and appointed that thanks should be returned by the moderator to the heritors for their having erected such proper accommodation to the minister of Botriphnie."

(*b*) This judgment was appealed, but the appeal was subsequently withdrawn.

CHAP. IX.

Presbytery that a manse is "sufficient" does not necessarily mean that it is "free." Indeed these remarks may almost be said to imply that in such a decree nothing short of the use of this term "free" as a word of style will suffice.

Condition of
"free manse"
constructively
inferred.

66. While such a decree constitutes the most formal attestation of the sufficient condition of the manse, and of the minister's consequent liability to uphold it, he may nevertheless, as would appear, effectually subject himself in this burden by judicially admitting that his manse is in a complete state of repair, or even by conduct which constructively amounts to such an admission. A principle to this effect seems to be recognised in the case of Lochcarron (*a*), where it was, *inter alia*, held that an incumbent, who had in 1821 judicially declared himself satisfied with certain repairs then executed on and additions made to his manse by the heritors, was thereby barred from demanding in 1832 further additions, the heritors *consenting* by minute to execute certain specified repairs and such additional repairs as were "necessary to put the manse and offices in a sufficient and tenantable condition as at the present time."

Case of
Lochcarron.

67. Without any judicial or formal declaration on the subject, a constructive admission to this effect on the part of the minister may possibly suffice; and it was stated in the case of Kirkton (*b*) that such admission will be inferred, "if a building has been constructed as a manse, taken possession of without objection by the incumbent, and not objected to by the Presbytery at the time of its occupation, or for a long course of years subsequently." This is not, however, consistent with the earlier decisions above quoted, and seems to amount to an opinion that the Act 1663, c. 21, did not authorise or at least require the Presbytery to pronounce a decree of "free manse;" that while, as matter of custom, it

Kirkton.

(*a*) Mackenzie v. Mackenzie, 1835, 12 S. 151 and 13 S. 1014.

(*b*) Elliott v. Hunter, 1867, 5 M.P.

1028. The passage cited in the text is per Lord Justice-Clerk Patton, and occurs at p. 1031.

has frequently been pronounced, no right to demand such a deliverance from the Presbytery belonged to the heritors; and that, although no such decree be pronounced, possession and recognition for a tract of years of the building *qua* manse will operate all the legal effect which a decree of "free" manse itself would do. Such an opinion seems to conflict with that expressed on the same subject by Lord Eldon in 1813 (*a*), by Lord Robertson in 1818 (*b*), and with the import of the case of Cairney in 1786 (*c*).

68. The personal obligation imposed by law on the minister to uphold a "free manse" subsists during the whole period of his incumbency when the declaration is made by the Presbytery, and for fifteen years when it is made by the Sheriff. Hence it follows that culpable failure on his part to implement this obligation renders him, in the event of demission of the cure, or his representatives after his death, liable to the extent to which the manse has been damnified by such failure. This doctrine is illustrated by the cases cited (*d*). The former was an action by the parishioners against the incumbent on his "departure," founded on the Acts 1663, c. 21, and 1612, c. 8 (*e*), and concluding for 300 merks as the extent to which the manse had been deteriorated by his default; and, as the report bears, "the Lord Advocate found the summons "relevant." In the second case, that of Manor, the Court

Liability for failure to uphold free manse.

Case of Manor.

(*a*) On this subject, in the case of Strathaven, *Hamilton v. Scott*, his Lordship remarks, 5 Paton, at p. 749,—“Yet by the construction put “on this Act (1663, c. 21), I hold “the law of Scotland to be, that “if the heritors of a parish wish “to free themselves from all future “ordinary repairs they must cause “the manse either to be built or “repaired, so as to warrant a declaration that the manse is free, and “that *when they have so done*, and “have got a declaration of the Presbytery that the manse is sufficient and “free, they will be exempt from all “future repairs, except in the special

“case of total decay arising from the “lapse of time.”

(*b*) See *ante*, p. 387, note (*c*).

(*c*) Heritors of Cairney *v.* Presbytery of Strathbogie, 1786, M. 8514.

(*d*) His Parishioners *v.* Mackinla, 1671, 2 Br. Supp. 528; Douglas *v.* Heritors of Manor, 1695, M. 8501; *cf.* Donaldson *v.* Brown, 1694, M. 471.

(*e*) The clause in this Act, for which it was founded on in the summons, is probably this:—“And “if they (the ecclesiastical persons), “or any of them, suffer the said “houses or manses to ruin or decay, “in their default the successor shall “have action against their executors “for the same.”

found that if the manse was deteriorated in the incumbent's time, his representatives were bound to make it up in as good condition as he got it. If, however, the manse be not in point of law a "free" manse, the provisions in the Act 1663, c. 21, do not apply to its occupant; and it does not appear that either the minister or his representatives would in such a case be liable for the deteriorated condition into which the manse had fallen during his incumbency (*a*), unless, indeed, this condition was due to the destruction of the building wilfully or through gross carelessness on the part of the incumbent. No case has occurred for more than two centuries of a successful claim against the representatives of an incumbent.

SECTION XVI.—*Heritors' liability to repair the Manse.*

Obligation
under 1663,
c. 21.

69. The obligation imposed on heritors by the Act 1663, c. 21, is, as already indicated, twofold—viz. (1) to build competent manses; and (2) thereafter to defray the cost of their repair in certain circumstances. The former obligation, which has been already commented on, points to the case where the incumbent had no manse at all; the heritors were ordained to supply the want by building a manse for him. The latter obligation, which is contained in two separate clauses of the Act, is thus expressed—

"And where competent manses are already built, ordains the heritors of the parish to relieve the minister and his executors of all cost, charges, and expenses for repairing of the foresaid manses. Declaring hereby, that the manses being once built and repaired, and the building or repairing satisfied and paid by the heritors, in manner foresaid, the said manses shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy, out of the readiest of the vacant stipend."

The former clause possibly refers mainly to the state of dilapidation in which, doubtless, many existing manses then

(*a*) See *M'Aulay v. Auchinleck*, 1751, M. 8506.

were, and it imposed on the heritors the burden of putting such manses in a thorough state of repair; while the latter clause, dealing both with such manses and with those then newly built, and in—it may be assumed—complete repair, seems to declare that when the minister has once been put, at the heritors' expense, in possession of a competent manse, the heritors are then relieved from the burden of ordinary repairs upon it, the cost of which is to be defrayed by the occupant during his incumbency, and during a vacancy by the heritors out of the vacant stipend payable by them.

70. In dealing with this latter provision, the Court confined it strictly to operations falling within the category of repairs proper, and indeed of ordinary as opposed to extraordinary repairs; and accordingly refused to apply vacant stipend not only toward *re*-building a ruinous manse (*a*), but even to defray the expense of repairs on the manse whereby its condition was improved (*b*). The application of vacant stipend, as now explained, is substantially consistent with the state of the law on the subject until about the year 1814, when such stipend became payable exclusively to the Ministers' Widows Fund, under 54 Geo. III. c. 169, section 9.

Vacant
stipend, how
formerly
applied.

54 Geo. III.
c. 169.

71. The effect of this, and subsequent enactments of similar import, has been to increase to a corresponding extent the heritors' liability for repairs on the manse; and the general doctrine on the subject now is, that they are liable in the expense of all necessary repairs on the manse, whether of an ordinary or extraordinary description, save during the incumbency of a minister who has been provided with a "competent" or "sufficient" manse in the sense of law, in which case their liability for repairs during his incumbency is limited to such repairs as are of an extraordinary description. This statement implies that the heritors are bound to execute all necessary repairs on the

Heritors'
present
liability.

(*a*) *Moncrieff v. Couper*, 1729, M. 8502. Heritors of New Machar, 1734, M. 8503.

(*b*) *King's College, Aberdeen, v.*

CHAP. IX.

Repairs when
manse "free"
and when
"not free."

manse, except those which, as already explained, the minister is bound to execute (*a*).

72. Accordingly, when a manse, if a "free" manse, is in a state of dilapidation, then, provided (1) that it be in a repairable condition, and (2) that its state of dilapidation does not arise from failure on the part of the incumbent to do what is necessary in the way of upholding it, the heritors are bound forthwith to execute upon the building such repairs as are necessary to render it competent and sufficient as a manse. When the manse, not being a "free" manse, is in a state of disrepair, then, if the building be in a repairable condition, the heritors are bound forthwith to execute whatever repairs, without any exception, are necessary to render the building competent and sufficient as a manse, including the execution of drainage, when necessary, and the removal of sources of discomfort or unhealthiness (*b*).

Extent of
heritors'
liability.

73. The Act 1663, c. 21, specifies no limit to the pecuniary liability of heritors in regard to repairing manses; and, as the cases of *Aberdour* (*c*) and of *Elgin* (*d*) show, the Court act on the principle that no *pecuniary* limit in this matter exists (*e*). Indeed it may be said that no limit of any kind exists, unless it be the practical limit which arises from the fact of the manse being in an unrepairable, as opposed to a repairable, condition. When the manse, being repairable, requires repairs, these must be executed upon it by the heritors, irrespective of the question of cost.

(*a*) *King's College, Aberdeen, v. Heritors of New Machar, supra.*

(*b*) *Heritors of Strathblane v. Hamilton*, 1827, 5 S. 913, where the heritors were required to make the manse free from damp. See also *Carmichael v. McLean*, 1837, 15 S. 1020; *Earl of Glasgow v. Murray*, 1868, 7 M.P. 6.

(*c*) *Dingwall v. Gardiner*, 27th Nov. 1816, F.C.; *affd.* 1821, 3 Bligh, 72, and 1 Shaw App. 10.

(*d*) *Magistrates of Elgin v. Gatherer*, 1841, 4 D. 25.

(*e*) A similar principle seems to have been recognised in the old case

of *Minister v. Parishioners of Forgan-denny*, 1668, 1 Br. Supp. 567, where the Court sustained a charge by the minister against the heritors for £2000 Scots, expended on the reparation of his manse. Here, in reply to the defence that this sum should not fall on the heritors, but be payable out of vacant stipend, the plea was sustained that, the minister having been presented to the whole stipend due thereafter, and having served the cure until admitted, the admission drew back to the date of his presentation.

74. While, in strict language, no building, however much decayed, can be said to be absolutely incapable of being repaired, *i.e.* restored by reparation, it is yet true of manses, as of churches and other buildings generally, that there is a state of dilapidation which negatives the propriety of expending money on their repair. Up to this point the manse is in law in a repairable condition, and being so, the heritors must, in the ordinary case, repair it. When, however, the point referred to is passed, and the manse is in such a structural state of dilapidation as that it would plainly be an injudicious and unprofitable proceeding to expend money in executing repairs upon it, law holds the building to be constructively unrepairable (*a*), and in this condition of matters imposes on the heritors the alternative obligation of rebuilding the manse *in toto*. This alternative obligation, which is more onerous than that of repairing, arises only in respect that the manse is unrepairable in the sense above explained.

Repairable
condition.

SECTION XVII.—*When Manse to be rebuilt rather than repaired?*

75. The solution of the question whether, in a given case, a manse being in a state of disrepair is to be rebuilt rather than repaired, or *vice versa*, depends mainly on the result arrived at on a consideration of the three following points, viz.—1st, the probable period of the duration of the building in a condition entitling it to the character of a “free manse,” assuming the proposed repairs upon it executed; 2nd, the estimated cost of such repairs as compared with the value of the existing fabric; and 3rd, the relative amount of renovation or reconstruction of the fabric which such repairs involve. In judging of the repairs proposed to be executed

Considerations
pointing to
rebuilding or
to repairing.

(*a*) The test applied by Lord Fullerton on this point is, “whether, according to the rules of ordinary prudence, the building is one which

“any reasonable man would think “of repairing.”— See *Heritors v. Minister of Orlig*, 1851, 13 D. at p. 1335.

CHAP. IX.

on the manse with the view of obviating the alternative of rebuilding, it is to be kept in view that the manse must be thereby put in a *sufficient* state, such a state in fact as would warrant the Presbytery or the Sheriff in declaring it a "free" manse (a).

Duration of
sufficiency
required.

76. But when the manse is incapable, by any reasonable repairs that can be made on it, of being put, or if put, of continuing for any considerable period thereafter in a *sufficient* condition, it must be rebuilt. The exact duration of the period of continuing sufficiency cannot be fixed, but in the case of Orlig an estimated continuing period of sufficiency of the manse for fifteen years was deemed an inadequate period to justify the operation of repairing, and the manse was ordered to be rebuilt. The statute 31 and 32 Vict. c. 96, section 12, on the other hand, points at fifteen years as a reasonable life after repairs.

Case of
Orlig.

Repairs not
excessive as to
cost.

77. Even when reasonable repairs are practicable, and would on being executed put and keep the manse for some considerable time thereafter in a *sufficient* condition, still, if their estimated cost be excessive, or even very large, as compared with the value of the existing fabric, the rules of prudence may forbid the proposed outlay of money, and suggest the expediency of applying it rather in defraying *pro tanto* the expense of a new structure than in unprofitably repairing the old. This was one element on which in the above case of Orlig the Court founded as a reason for ordaining the manse to be rebuilt rather than repaired. Here the expense of thorough repair did not fall much short of rebuilding. It does not seem, however, that the difference in this respect

(a) This doctrine is recognised in the case of Orlig, *supra*, where Lord Fullerton observes, 13 D. at p. 1335:—"When, in a case of this kind, involving the obligations of heritors to rebuild, a comparison is instituted between the expense of rebuilding and that of repair, the latter must be understood (as) a total and efficient repair, which

"will place the building nearly in the same situation, as to comfort and stability, as if it were rebuilt." The propriety of this rule is justified by the remark of Lord President Boyle, who says, *ibid.*—"We are not to lay upon the minister the burden of supporting an insufficiently repaired fabric."

requires to be so slight as was there the case in order to warrant the alternative of rebuilding. A much greater disproportion of relative cost than occurred in that case might still be insufficient to obviate the necessity of rebuilding (*a*).

78. When the execution of sufficient repairs involves a very extensive renovation of the existing building, and such as, compared with the extent of the unrenewed portions of the fabric, practically amounts or nearly approaches to a *reconstruction* of the building (*b*), then the Court will be inclined to order the manse to be rebuilt *in toto*, as being the most prudent and beneficial course to adopt for all concerned (*c*). While the three elements above adverted to embrace the principal grounds on which the Court will be inclined to proceed in deciding whether a manse is to be rebuilt rather than repaired merely, it may be added that the personal comfort of the minister must not be overlooked. While capricious objections to the site of the existing manse will not avail, objections on the ground of personal discomfort

Repairs not to amount to a reconstruction.

(*a*) This is deducible from the reference made in the case of *Olig*, *supra*, by Lord President Boyle to that of *Rosskeen*, 1830, 8 S. 475, as an authority which would have justified the Court in ordaining the manse of *Olig* to be rebuilt rather than repaired, even although the cost of the former operation, as compared with that of the latter, had been much greater than it was, his Lordship remarking that the law as to repairing and rebuilding manses and churches is the same. This latter point is confirmed by *dicta* to the same effect by Lord Braxfield in *Dundas v. Nicolson*, 1778, 2 Hailes, 802; and Lord Robertson in *Cunninghame v. Deans*, 12th Dec. 1811, F.C.

(*b*) This appears to have been the ground on which, in the case of *Saddel*, in 1811, the Court decreed for a new manse. See Connell Par. p. 299.

(*c*) This point is directly alluded to by Lord Mackenzie in the note to his interlocutor in *Hamilton v. Clason*, 1826, 4 S. 543, and 1 Fac. Dec. 478,

where he says—"Mr. Burn's report "appears to the Lord Ordinary "sufficient to show that this is not a "case of mere repairing in the proper "sense of the word; the greater (and "obviously much the greater) part of "the manse being in such a condition "that it must be taken down. Now "in such a case the Lord Ordinary "does not see sufficient reason or "authority for holding that it is "inflexibly necessary to leave stand- "ing any smaller part or parts of "the house which can be so left, "and to attach the new building to "these, instead of taking down the "whole, and building a manse wholly "new; when the former cannot be "done without inconvenience and "awkwardness, and when the latter "is better both for the minister and "heritors, such an absolute rule "would prevent a new manse from "almost ever being built, for it "seldom happens that any house "decays quite equally all over."— See relative Session papers, vol. 123, No. 354, p. 6.

arising from inveterate dampness, unhealthiness of situation, or even from the confined position or overcrowded neighbourhood of the existing manse, will form a strong, and with other comparatively slight circumstances tending in a similar direction, perhaps a sufficient ground to induce the Court to ordain the manse to be rebuilt in a different and better situation. To this effect are the cases of Dunnichen (*a*) and Dalziel (*b*), where, in consequence of dampness and unwholesomeness, the manse was ordered to be rebuilt though part of the existing structure was capable of being repaired.

SECTION XVIII.—*When Manse to be repaired and enlarged?*

Obligation to
enlarge.

79. Situated midway, as it may be said, between the operations of repairing merely and of rebuilding, and practically involving both, occurs the combined operation of repairing and enlarging the manse, which in certain circumstances the heritors may be required to do. This operation is not mentioned in the Act 1663, c. 21, or in any of the relative prior statutes; and for some time the tendency of judicial opinion was to negative the right of Presbyteries, and consequently of the Court, to ordain heritors under any circumstances to increase the size or even improve the internal convenience of the existing manse. This tendency appears in the cases of Creich (*c*), Dalmeny (*d*), and Channelkirk (*e*), but in the last of these cases two of the Judges (*f*)

(*a*) Dempster *v.* Headrick, 2 Dec. 1813. See Connell Par. p. 300.

(*b*) Hamilton *v.* Clason, *supra*, 4 S. 543, and 1 Fac. Dec. 480. Here the manse, besides being "defective" in safety and accommodation, was so situated as, in the reporter's opinion, to render it "extremely doubtful if the comfort of the manse can be effectually secured where the area around is so confined and limited, and the churchyard continued in its present situation." See 4 S. 544. See also Heritors of Strathblane *v.* Hamilton, 1827, 5 S. 913.

(*c*) Greenlaw *v.* Heritors of Creich,

1778, 5 Br. Supp. 513. On this case the reporter remarks—"But, on the other hand, it does not appear that a Presbytery has any power to oblige the heritors to make a manse larger, or to build a wing to it, when formerly it had none; nor even to decorate a manse, or make it more convenient in the inside, while at the same time it is sufficient without."

(*d*) Robertson *v.* Earl of Rosebery, 1788, M. 8515.

(*e*) Shiels *v.* Heritors of Channelkirk, 1818, 13 S. 1018.

(*f*) Lords Robertson and Bannatyne.

were clearly of opinion on the abstract point of law that Presbyteries had jurisdiction to decern for additions to manses. This opinion, which had previously been expressed and applied in the case of Strathblane (*a*), has since been repeatedly affirmed (*b*); and the doctrine may now be considered as conclusively fixed, that in appropriate circumstances the Presbytery may ordain the heritors to enlarge the manse. The Act 31 and 32 Vict. c. 96, fully recognises their jurisdiction in this respect.

80. The instances in which the heritors may be required to enlarge the manse may be stated to be those in which, on the one hand, the manse has not been accepted as sufficient, and the accommodation of the existing building is substantially less than would be authorised if the manse were to be rebuilt; and, on the other hand, where the state of disrepair is such as implies in the execution of the requisite repairs a renovation more or less extensive of the building. Enlarging the manse is just a special mode of remedying a double defect in the building, viz. insufficiency in point (1) of structural condition, and (2) of accommodation. The existence of the latter defect alone will not, however, warrant a decerniture for enlargement, at least in the case where the manse has been accepted of as sufficient by the minister, or declared a "free manse" by the Presbytery. A doctrine to this effect was recognised in the case of Kirkliston (*c*). The point, which was again raised in the case of Lochcarron (*d*), but was not specially decided, was considered as fixed to the effect now stated in the case of Symington (*e*), where the law on the

When the manse is to be enlarged.

(*a*) Heritors of Strathblane v. Hamilton, 1827, 5 S. 913. Here the manse consisted of two public rooms on the lower floor, and four bed-rooms on the upper floor, besides kitchen and offices. An addition was ordered to be made on the manse, but it was ultimately rebuilt.

(*b*) Mackenzie v. Mackenzie, 1833, 12 S. 151, and 1835, 13 S. 1014; Carmichael v. M'Lean, 1837, 15 S.

1020; Heritors v. Minister of Kingoldrum, 1863, 1 M'P. 325.

(*c*) Hog v. Ritchie, 25th June 1808, not reported. See Connell Par. p. 297, 305. The case is also mentioned in the Lord Ordinary's note in Carmichael v. M'Lean, *supra*, 15 S. 1025.

(*d*) Mackenzie v. Mackenzie, 1833, 12 S. 151, and 1835, 13 S. 1014.

(*e*) Carmichael v. M'Lean, 1837, 15 S. 1020.

CHAP. IX.

Disrepair
must be
substantial.

subject is very clearly stated by Lord Moncreiff in the passage cited below (a). The rule was approved and explained by Lord President Inglis in the case of Inch (b).

81. On the other hand, when a manse can by the execution of slight repairs upon it be made perfectly sound and sufficient, the Presbytery cannot ordain the heritors to enlarge it. To warrant their doing so, the manse must be in such a condition of disrepair as to involve the necessity of structural renovation to an appreciable and indeed substantial extent (c). Hence, to impose on the heritors the burden of enlarging the manse, these two conditions must as a general rule co-exist, viz. (1) a substantial state of disrepair; and (2) deficiency of accommodation.

Deficiency of
accom-
modation,
quid?

82. The deficiency of accommodation must, it would appear, be such as is predicable of the manse as a residence for the successive incumbents of the parish generally, or *qua* class, as opposed to a deficiency more or less personal to a particular incumbent, arising, it may be, from exceptional wealth or from domestic circumstances—as his having an unusually numerous family. Deficiency of accommodation must be tested, not by special cases, but by a general standard;

(a) “It appears to the Lord Ordinary to be settled, on the one hand, that when a manse has been built and accepted of, and approved of by the Presbytery, the minister is not entitled, simply on the ground that the accommodation is not such as may have been generally provided in other cases, or because the sizes and forms of the apartments may not be according to the fashion of the times, to require the heritors to make extensive alterations on it, or additions thereto; and that even although some repairs may be necessary of a small or inconsiderable nature, such a necessity will not make way for a demand for remodelling and adding to the house so as to render it in all respects a suitable manse according to the views entertained at the time. But, on the other

hand, he holds it to be equally settled that where a manse has, either from original insufficiency or by the lapse of time, come to be in such a state that it requires extensive repairs to render it even habitable, it is then competent for the Presbytery, and for this Court in reviewing their sentence, to consider, not merely what is absolutely essential to render the old building habitable, but what ought reasonably to be done, by alterations and additions, to render the manse a suitable residence for the minister in the circumstances of the parish.”—See 15 S. 1024.

(b) *Heritors v. Minister of Inch*, 1869, 8 M’P. 363.

(c) See last note, and per Lord Justice-Clerk Patton in *Elliott v. Hunter*, 1867, 5 M’P. at p. 1031.

and that accommodation only can be held defective which falls sensibly below the average amount assigned as adequate to the domestic necessities and comfort of persons occupying the social position of parish clergymen. The requisite relative proportions in which the two elements now adverted to must be realised it would be impossible to define. This much, however, appears deducible from the various decisions bearing on the point, viz. that in proportion as the extent of deficiency of accommodation is in a given case small, the extent of disrepair must be relatively great, in order to subject the heritors in the obligation of enlarging the manse.

83. In the case of Strathblane (*a*), where it was held competent for the Presbytery to order additions to be made, the manse had been erected in 1732, and partially rebuilt about 1795. It was damp, with the floors and joisting in a rotten state; the levels of the different stories requiring to be altered two or three feet; and one of the gable walls was insecure (*b*). In the case of Symington (*c*), the manse, which was built in 1790, and repaired and added to in 1824, had straight and substantial walls; but the accommodation was inadequate, and the internal fittings and arrangements were antiquated and much out of repair. Here the Court ordered various important additions and alterations to be made on the manse. In the case of Kingoldrum and of Inch (*d*) the manse and offices and garden wall were in a state of considerable disrepair; and partly owing to insufficiency in their original construction, and partly to subsequent decay, and to the existence of damp in parts of the house, were held unsuitable for the minister's accommodation.

84. The fact of the newness of a manse, as indicative or corroborative of its being in a sufficient state of repair, is a

(*a*) Heritors of Strathblane v. Hamilton, *supra*, 5 S. 913.

(*b*) See report of the case, and also per Lord Ordinary Jeffrey in the case of Lochcarron, Mackenzie v. Mackenzie, 13 S. 1017.

(*c*) Carmichael v. M'Lean, *supra*, 15 S. 1020.

(*d*) Heritors v. Minister of Kingoldrum, 1863, 1 M'P. 325; Heritors v. Minister of Inch, 1869, 8 M'P. 363.

Circumstances
tending
against
enlargement.

CHAP. IX.

circumstance which tends to militate against a demand for additions on the ground mainly of defective accommodation. This principle was referred to as one ground, if not *the* ground, on which in the case of Dalmeny the Court refused to ordain the heritors to enlarge the manse (*a*). Although no decree of "free manse" has been pronounced, yet, when the minister has judicially declared his satisfaction with proposed additions and repairs, which have in consequence been executed, this will operate adversely to the success of a subsequent demand for additions, especially if such demand be made within a short time after the execution of the former additions and repairs, and by the incumbent who judicially accepted of the same as sufficient (*b*).

85. In Mr. Duncan's work details of the particulars of a number of cases are given (2nd edition, page 454) which, in view of the changing conditions and requirements of clerical life, it is unnecessary here to repeat. Reference may, however, be made to the cases undernoted (*c*). It has been said that "the rental and general circumstances of the parish do "legitimately enter into consideration" (*d*).

Lord Kinloch's
rule.

86. In the case of Inch (*e*) the rule in regard to the accommodation to be provided was thus stated by Lord Kinloch—

"It is of great importance that the residence of the minister of a parish should be suitable to his position and comfortable for his family . . . The manse of the minister should be the dwelling-house of a gentleman. This is very properly attended to in the construction of new manses."

(*a*) Per Lord President Hope in *Heritors of Strathblane v. Hamilton*, 1827, 5 S. at p. 914.

(*b*) On this point see *Mackenzie v. Mackenzie*, 1833-5, 12 S. 151, and 13 S. 1014, which was decided on this principle.

(*c*) *Hog v. Ritchie*, 1808, not reported.—See *Connell Par.* pp. 297, 306; *Anwoth*, 1812, *ibid.* *Hamilton v. Clason*, 1826, 4 S. 543, and 1 Fac. Dec. 478; *Heritors of Strathblane v. Hamilton*, 1827, 5 S. 913; *Carmichael*

v. M'Lean, 1837, 15 S. 1020; *Heritors of Balfron v. Niven*, 1863, 1 M'P. 324; *Heritors v. Minister of Kingoldrum*, 1863, 1 M'P. 325; *Earl of Glasgow v. Murray*, 1868, 7 M'P. 6; *Heritors v. Minister of Inch*, 1869, 8 M'P. 363.

(*d*) Per Lord Moncreiff in *Carmichael v. M'Lean*, 1837, 15 S. at p. 1026.

(*e*) *Heritors v. Minister of Inch*, 1869, 8 M'P. 363.

Applying this rule to the conditions of life in the twentieth century, it is thought that the minister is entitled, where practicable at a reasonable cost, to a suitable water supply in the house, and, in case of rebuilding or reconstruction, to have a bathroom. No person in the social position indicated by Lord Kinloch would, in the present day, build a house for himself or willingly hire a house which did not possess these conveniences (*a*).

87. It has been already remarked that wholesomeness of situation is an important requisite in a manse. When, therefore, incurable dampness or other permanent cause of unhealthiness attaches to the site of the existing manse, the Court are inclined, *in dubio*, to require the manse to be rebuilt elsewhere, rather than repaired and enlarged (*b*). When this is so, and generally when the former alternative is adopted, the Court will be inclined to authorise a more liberal amount of accommodation than would have been the case if the building had merely been ordered to be repaired and enlarged.

Enlarging and
rebuilding
would
increase
accom-
modation.

SECTION XIX.—*Selection of a Site for the Manse.*

88. When a manse is to be built for the first time, or an old manse is to be rebuilt, a site therefor must be chosen. While the heritors, as the persons at whose expense the manse is erected and is to be maintained, and the incumbent for the time as the future occupant of the building, are chiefly interested in the subject, and on this ground ought to be consulted, and are undoubtedly entitled to be heard upon the matter, it is suggested by Mr. Duncan that the right of selecting the site of the manse, subject to review by the Court, is vested in the Presbytery, or a committee of their number, along with two or three of the most knowing and discreet men appointed by them. He quotes the case of

Vested in
the Presby-
tery.

(*a*) *Earl of Glasgow v. Murray*, 1868, 7 M.P. 6. (*b*) Cases in note (*d*), p. 401.

CHAP. IX.

Case of
Lochmaben.

Lochmaben (*a*), where the Court found that “the ministers”—meaning thereby, as the report shows, a committee of the Presbytery—were by our law empowered to choose the most convenient place for the site. But it is thought that whilst no doubt the Presbytery may, if the heritors take no action, designate a site, the initial choice is with the heritors, and that if they offer a suitable site the Presbytery cannot insist on choosing another.

Character of
the lands not
an element.

89. In dealing with the designation of manses and glebes the Act 1644, c. 31, makes Kirk lands or houses primarily liable for selection, and temporal lands only in default of the other. Hence this Act seems to direct, or at least to imply, that the mode in which manses were to be provided was by “taking” or appropriating for the use of parish ministers houses formerly belonging to the Romish clergy, situated either (1) on Kirk lands or (2) on temporal lands. The two subsequent relative statutes, 1649, c. 45, and 1663, c. 21—which do not deal with glebes proper—direct that the way in which manses are to be provided to ministers is by the heritors *building* them; but neither Act alludes in any way to the character of the ground—Church lands or temporal lands—which is to be selected as the site on which the manse is to be built. It does not appear that this distinction in the character of the manse ground has ever been practically dealt with as a governing element in the selection of a site for the manse, save in so far as the half acre of manse ground may have formed part of, or may have been designated along with, the four acres of arable glebe.

Governing
rule, proximity
to the church.

90. The general rule or principle which mainly regulates the site of the manse is proximity to the parish church. The application of this rule is directly traceable to express requirement to this effect in the Acts 1502, c. 218; 1594, c. 202, and subsequent statutes. The reason for its adoption was probably, in part at least, the circumstance that none of

(*a*) *Steel v. His Parishioners*, 1712, M. 5131, 8498.

the Acts referred to impose on the heritors the obligation of providing a robing or retiring room at the church for the minister's use. Hence it was naturally deemed proper that for his comfort and convenience in going to and returning from the church on Sundays his manse should be situated in close proximity to that building. Accordingly the Court held, in the old case of *Manela (a)*, where the church was rebuilt with consent of the heritors on a different site from the old one, that nearness to the new instead of to the old church was to regulate the designation of ground for a manse or glebe. The above rule applies likewise to the *re*-building of a manse—involving practically the result that the new house is usually erected on or near to the site of the old one.

91. While due weight must be given to the general rule now indicated as regards the site of the manse, its application is incumbent, and indeed permissible, only when not inconsistent with sanitary considerations. The minister has a good interest to resist a resolution either of the Presbytery or of the heritors to erect his manse in a situation pernicious to health, whether arising from excessive or incurable dampness, from proximity to noxious exhalations, or from other causes; and the judgments pronounced in the cases of *Dalzell (b)*, *Strathblane (c)*, and *Symington (d)* indicate that when such a well-grounded objection exists the minister's opposition to the proposed site will be successful. Even the consideration of the personal comfort of the incumbent, when rested on reasonable as opposed to whimsical or capricious grounds of dislike to or preference for a given locality, is not to be disregarded (*e*).

(a) *Cheyne v. Parishioners of Manela*, 1629, M. 5136. Although, as stated in the text, the new church here was built with the heritors' consent, it does not seem that this speciality would affect the rule.

(b) *Hamilton v. Clason*, 1826, 4 S. 543, and 1 Fac. Dec. 478.

(c) *Heritors of Strathblane v. Hamilton*, 1827, 5 S. 913.

(d) *Carmichael v. M'Lean*, 1837, 15 S. 1020.

(e) Thus, in *Hamilton v. Clason*, *supra*, where the Court ordained the manse to be rebuilt in a *new* situation, the personal *discomfort* caused to the

Site subject to
controlling
circumstances.

CHAP. IX.

SECTION XX.—*Nature of a Minister's right to a competent Manse.*

Indefeasible
and inherent
in the
minister.

92. As has been already seen, the minister's right to the spirituality and temporality of the benefice—of which latter the manse forms a part—is in its nature indefeasible (*a*). One incumbent does not represent his successors in the cure to the effect of binding them by an arrangement on his part which is to their prejudice. Consequently, although he enter into an agreement whereby he foregoes a right to the possession of a manse, this agreement will not in the ordinary case debar the next incumbent from demanding one from the heritors (*b*). Indeed, apart from the principle just stated, the construction put on the statutory burden laid on heritors by the Act 1663, c. 21, "to build competent "manses to their ministers," implies that each person, on becoming "minister" of the parish, is by force of this provision entitled to demand and obtain a "competent" or "free" manse, *i.e.* a dwelling-house and offices, "sufficient" in point of repair and accommodation. This claim forms part of the civil fruits or emoluments of the benefice to which, *qua* incumbent, the minister acquires right, in virtue of the title conferred on him by a valid appointment followed by induction. The right is at once inherent in the donee of the benefice, and, *quoad* his successors, is indefeasible by him.

Right
unaffected by
amount of
stipend.

93. This right on the minister's part is not, in the ordinary case (*c*), dependent on, or indeed affected by the

clergyman from the situation of the old manse was specially founded on in the report of the man of skill on which the judgment of the Court proceeded.

(*a*) See *ante*, p. 243.

(*b*) Minister of Falkland *v.* Johnston, 1793, M. 5155. See also Carnegie *v.* Spied, 1849, 11 D. 1250.

(*c*) The remarks made in this section refer to the incumbents of

ordinary parishes, *quoad omnia*, to which the Act 1663, c. 21, applies, and are in some respects inapplicable to the ministers of parishes *quoad sacra* generally, and even of parishes, though *quoad omnia*, where the terms of the erection are such as exclude or qualify the minister's right to a manse, or his claim against the heritors to repair it.

amount of his stipend (*a*); or, on a like principle, by the extent or value of the glebe. The Act 1663, c. 21, makes no qualification of or exception to an incumbent's claim for a manse founded on specialties of this kind, and law does not recognise any such. Except in so far as the manse is a "free" manse, or the incumbent has by his own act or conduct excluded himself from requiring the heritors to execute, when necessary, repairs upon it, he cannot be deprived of his right to this effect.

94. When the question, whether the heritors are bound to provide a manse to the incumbent as part of the benefice attached to the cure, is raised in a competent action, such as a declarator, all parties interested in the result of this question should be made parties to the suit, including the minister, the Presbytery of the bounds, and the body of heritors. When such an action is raised, and the point at issue is fairly litigated, it may be inferred from the *dicta* expressed in the case of Elgin (*b*) that a judgment therein pronounced would amount to and might be afterwards founded on as *res judicata*. When, however, the action is not of this general character, but has for its exclusive or principal object that of vindicating the incumbent's alleged individual right a judgment adverse to this claim, though obtained in a regular manner, will not exclude the revival of a similar claim at the instance of a succeeding incumbent. This may possibly have been the view taken in the Dunfermline case (*c*), where, although it was in 1750 found by the Court, on review of a deliverance by the Presbytery pronounced in a process of designation, that the then minister of Dunfermline was not entitled to a manse, the plea of *res judicata* founded thereon, and urged by the heritors in a subsequent process of designation by the then minister in

Form of
action to
decide right.

Res judicata.

(*a*) Gibson *v.* Hepburne, 1673, 1 Br. Supp. 699.

(*b*) Magistrates of Elgin *v.* Gatherer, 1841, 4 D. 25. See per Lord Ordinary

Cuninghame, p. 30, and Lord Fullerton, p. 33.

(*c*) Minister *v.* Heritors of Dunfermline, 1805, M. *Manse*, Appx. 1; affd. 1812, 5 Paton, 593.

CHAP. IX.

1803, was repelled (*a*), and it was found that he was entitled to a manse, and the heritors were ordained to build one accordingly.

SECTION XXI.—*What constitutes "a Manse" in law?*

Appropriation
to the benefice.

95. To constitute a dwelling-house "a manse" in point of law, and so bring it within the scope of the Act 1633, c. 21, or other statutes which contain provisions relating to manses, it seems essential that the building be dedicated as a place of residence for the successive incumbents in the cure of the parish, and as part of the temporality of the benefice. It is not enough that the house has *de facto* been the sole residence of one incumbent, or even of a series of incumbents. It must further have been so possessed by them as and in respect that it formed a part of the temporality attached to the benefice. Their occupancy of the house must be referable to this as its title, and not to any private arrangement. Thus, in a case (*b*) where a house had been mortified to the "then minister of the gospel at Queensferry, and his successors in office, as a constant "manse" in satisfaction of the dispositive's bond for augmentation of the minister's stipend, it was held that the succeeding incumbent had no claim against the executors of the said minister in respect of the untenable condition in which he had left the house at his death.

Presbytery's
intervention
not essential.

96. While this is so, however, it is to be observed that a house may be "the manse" of the parish, not merely when it is voluntarily built by the heritors as such, without a requirement to this effect by the Presbytery, but even without the intervention to any effect of the Presbytery in

(*a*) The grounds on which the plea of *res judicata* was disposed of in this case are not clear, and in the Elgin case Lord Cuninghame seems to have had some difficulty in explaining the Dunfermline case, 4 D. at p. 30.

(*b*) *M'Aulay v. Auchinleck*, 1751,

M. 8506. See also Ersk. ii. 10, 58, who observes that the Act 1663, c. 21, "does not appear to reach to an "house gifted to the church, which "is intended by the donor, not for "an habitation to the minister, but "as an addition to his stipend."

reference to its construction—nay, without any subsequent formal recognition of the house *qua* manse by that body. Thus the ratio of judgment in the case of Inverkeithing (*a*) implies that the fact of ownership or occupancy of a house by the parson or vicar of old, or of its being situated on what formed his glebe lands, goes to presume a right on the part of the minister to claim it as his manse. In the case of Cairney (*b*), where the Presbytery refused to pronounce a decree of “free manse” as to a certain house in respect that it had been built by the heritors without their authority, and therefore was not a manse within the meaning of the Act 1663, c. 21, the Court repelled the plea, and remitted to the Presbytery to proceed with a visitation. Again, in the case of Brechin (*c*) the heritors were held bound to repair, *qua* manse, a house formerly known as the bishop’s manse, and which without formal designation had (along with a garden) been allocated in 1702 by the Teind Court to the first minister of the collegiate charge in lieu *pro tanto* of a sum of stipend.

97. While, therefore, the usual and most formal evidence of the fact that a particular house is a “manse” consists in a Presbyterial designation, a decree of “free manse,” or some other overt act whereby the dwelling-house and ground are dedicated, or are recognised to have been dedicated, as “the “manse” of the parish, and *qua* such form part of the temporality of the benefice of the cure, such dedication may be constructively inferred from facts and circumstances. Among these may be specially mentioned long and uninterrupted occupancy of the building by the successive incumbents of the parish as their sole residence, upkeep and repair by the heritors; and adminicles of evidence, which instruct or imply that at the outset, or during the course of this period of occupancy, the house was dealt with or known

(*a*) *Rough v. Ker*, 1631, M. 5124, and 8497.

(*b*) *Heritors of Cairney v. Presbytery of Strathbogie*, 1786, M. 8514.

(*c*) *Carnegie v. Spied*, 1849, 11 D. 1250.

Case of Inverkeithing.

Cairney.

Brechin.

Formal and constructive designation.

CHAP. IX.

as "the manse;" or that, prior to the Reformation, it was possessed and occupied as his residence by a Romish churchman.

SECTION XXII.—*Demand for Manse Accommodation or Repair, how made and implemented.*

Application
to the heritors,
or to the
Presbytery.

98. When a minister who has not a manse (being entitled thereto) desires to obtain one, he may apply either to the heritors in the first instance to build him a manse, and thereafter get the house when erected (with the manse ground) inspected by the Presbytery, and formally approved of and designated as the manse attached to the cure; or he may apply directly to the Presbytery for a designation. Or assuming, as is ordinarily the case, that a manse exists, but that at the time of his induction, or afterwards, the minister conceives it to be in a state of disrepair, he may in like manner apply to the heritors to repair, or to repair and enlarge or to rebuild it, as the case may be.

Inspection of
the manse by
Presbytery.

99. If the heritors comply with the minister's demand, then the Presbytery may be called on to inspect the building and approve of it. Or the minister may in the first instance apply to the Presbytery for a visitation, and they may, after inspecting the building and obtaining a report from men of skill as to its condition, ordain the heritors to execute such operations upon it as they deem suitable. In any of such cases the deliverance pronounced by the Presbytery is subject to judicial review in the form and manner elsewhere explained (*a*). These matters and the rule of liability for assessments are fully explained below in Chapters XII-XIV.

SECTION XXII.—*Minister's claim for Manse Maill.*

Manse maill,
quid?

100. It sometimes happens, more particularly on the occasion of the manse being rebuilt, that the minister is for a certain period deprived of manse accommodation. When

(*a*) See *post*, CHAPTER XIV.

this is so he is entitled either (1) to be provided by the heritors with a suitable residence during this period, or (2) to payment of a sum known as manse maill, *i.e.* manse rent, in compensation for the outlay incurred by him in procuring the use of a dwelling-house in the meantime. The latter is the form in which the obligation is usually discharged.

101. The claim itself has been recognised and given effect to in a variety of instances. Thus, in the case of Kippen (*a*), the minister obtained a decret against the heritors for £60 Scots yearly as house rent until his manse was rebuilt. In the case of Lochmaben (*b*) the Court found that the minister had a good claim against the heritors for as much as he had paid of house rent from his admission until his manse was built. In the case of Arbroath (*c*) the minister of a burgh, in respect of *decennalis et triennalis possessio*, was found entitled to bygones and rent in time coming, and this although the burgh was not made specially liable in providing a manse by a decret of plat or otherwise. In the (second) case of Dunfermline (*d*), as Connell mentions, the Court in 1813 found the minister entitled to a suitable recompense for the want of a manse since Martinmas 1804 until he obtained possession of the same, and remitted to the Lord Ordinary to fix the amount, which he did at £37:10s. *per annum* (*e*). In the case of Aberdour (*f*) the Court laid down the doctrine that each heritor was liable to the minister for manse maill only to the extent of the amount due by him as in an accounting with his co-heritors. The case of Kirkwall (*g*) is an instance in which, pending the adjustment of the liability of the heritors *inter se* for the expense of rebuilding the manse, a sum in name of manse maill was, of consent of the heritors, awarded to the minister.

Instances of
manse maill
being awarded.

Case of
Arbroath.

Dunfermline.

Aberdour.

Kirkwall.

(*a*) Potter *v.* Heritors of Kippen, 1708, 4 Br. Supp. 691.

(*b*) Steel *v.* His Parishioners, 1712, M. 5131, 8498, and 8502.

(*c*) Ferguson *v.* Magistrates of Arbroath, 1715, M. 8502.

(*d*) Minister *v.* Heritors of Dunfermline, 1805, M. Manse, Appx. 1; affd. 1812, 5 Paton, 593.

(*e*) See Connell Par. p. 336.

(*f*) Dingwall *v.* Gardiner, 1825, 4 S. 246.

(*g*) Baikie *v.* Logie, 1828, 6 S. 748.

CHAP. IX.

When claim
for manse
maill emerges.

102. While, as already observed, the claim in question usually emerges on the occasion of rebuilding the manse, it seems in principle to exist when the minister is presented to a parish in which there is no manse—he being entitled to one (*a*)—and also in the case of repairing and enlarging, or even repairing merely, the manse, when the work to be executed on the building is such as to render the minister's residence in it during the operations either impracticable or highly inconvenient or seriously disagreeable to him and his family.

Manse maill.

103. If not fixed by special arrangement, the amount of manse maill which the minister is entitled to claim seems to be commensurate with the sum of rent which he has paid or must pay for house accommodation which is reasonably comfortable and commodious. In the case of Aberdour (*b*), where the minister's manse was uninhabitable, he took a house for which he paid a rent of £21. In an action for manse maill the Court found him entitled to reimbursement at this rate. To a similar effect in the case of Lochmaben (*c*) the Court found the minister entitled to manse maill for so much as he had paid of house rent till his manse was built. In the case of Kirkwall (*d*) the minister was held entitled, of consent, "to a reasonable allowance for manse rent to be "fixed by the Sheriff of the county."

Amount of
manse maill.

Claim for
manse maill,
how enforced.

104. The Presbytery have no jurisdiction to enforce the claim, and the minister must when necessary make it effectual by an action in the ordinary Civil Courts. Thus, in the case of Kippen (*e*), where the Presbytery "gave it as their "opinion" that the minister should have £60 Scots yearly as

(*a*) Either under the Act 1663, c. 21, or by special right, as in Thomson *v.* Magistrates of Dunfermline, 1747, M. 11,275, and 1750, M. 8504, where, the parish being burghal-landward, the minister was entitled to manse maill under a judicial decree, and this right, as was there found, had

not been lost by the negative prescription.

(*b*) Gardiner *v.* Dingwall, 1823, 2 S. 409.

(*c*) Steel *v.* His Parishioners, *supra*, note (*b*), p. 411.

(*d*) Baikie *v.* Logie, *supra*, 6 S. 748.

(*e*) Potter *v.* Heritors of Kippen, *supra*, 4 Br. Supp. 691.

manse maill till he got a manse, the decree under which he obtained payment of this sum was pronounced in an action raised by him in the Court of Session. The necessity of adopting such a course was expressly affirmed in the subsequent case of Lochmaben (*a*), where the Court, *inter alia*, found that while the minister had in the circumstances a good claim for manse rent, "yet it cannot come in here in " this designation, but he must raise a process against his " heritors for the same."

105. In the case of Aberdour (*b*), where the minister raised an action against the only two heritors of the parish, concluding against them, conjunctly and severally, for payment of £50 yearly as manse maill for a specified period, the Court expressed the opinion that such a form of conclusion was quite unwarranted, as each heritor could only be liable in the proportion due by him, and on this principle held that to the extent to which one of the heritors had, under the decree here obtained, paid the minister beyond such amount, the latter was bound to repeat. It was likewise here decided that the one heritor, who had alone resisted the action, had no claim of relief against the other for the expenses incurred by him in the litigation.

106. Manse maill, in the sense in which the phrase has hitherto been used in this section, means a monetary compensation awarded to the minister in lieu of manse accommodation to which he is entitled under the Act 1663, c. 21, but of which he has been temporarily deprived. It not infrequently occurs, however, in the case of burghal parishes more particularly, that in virtue of special arrangement, or under a judicial decree (*c*), the parish minister is entitled, as part of the *cumulo*

Extent of each
heritor's
liability.

Manse maill
as part of the
benefice.

(*a*) Steel *v.* His Parishioners, *supra*, note (*b*), p. 411.

(*b*) Dingwall *v.* Gardiner, *supra*, 4 S. 246.

(*c*) As in the case of Kirkcudbright, where, in 1669, the Court of Teinds modified to the minister 100 merks in name of "manse rent;" to which, in virtue of this decree, he was found

entitled by a judgment of the Court of Session in 1786.—See Connell Par. 273. So also in the case of Dunfermline, Thomson *v.* Heritors of Dunfermline, 1747, M. 11,275 and 1750, M. 8504, it appears that in 1683 the first minister of the charge got a sum of £40 Scots modified to him as his "house maill."

CHAP. IX.

benefice of the cure, to a certain sum for house rent, sometimes styled "manse maill" or "manse rent." Under whatever name known, the minister's right to such a provision is entirely dependent on the nature and terms of the special agreement or decree, and must be regulated thereby.

SECTION XXIV.—*Providing and repairing Manses in Quoad Sacra Parishes under 7 and 8 Vict. c. 44.*

When manse provided.

107. In the case of *quoad sacra* parishes erected under 7 and 8 Vict. c. 44, section 8, it is assumed that before decree is pronounced, and as a condition of such decree, that an endowment for the maintenance of the future incumbent be secured. If such endowment do not exceed £100 of stipend in money, or seven chalders of oatmeal calculated at the highest fiars prices, and exclusive of communion element allowance, then "a suitable dwelling-house, or manse and offices, or appurtenances," are to be provided. In this case the title to the manse is to be taken and conceived so that it should be inalienably secured as the manse for the minister of the parish, and due provision is to be made for its future maintenance to the satisfaction of the Court.

Provisions for its maintenance.

Manses in parliamentary districts, and in parishes under 7 and 8 Vict. c. 44, s. 15.

108. The Act further provides, section 9, that the seat rents of the church of such parish may be partly applied "for the purpose of upholding in due repair and improving 'the fabric' of the church or manse. In the case of the erection into *quoad sacra* parishes under 7 and 8 Vict. c. 44, section 14, of parliamentary districts, under 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, dwelling-houses and appurtenances, as required by these two last statutes, already exist, the provisions of which "may be held and taken to be sufficient provisions for upholding in 'repair' these dwelling-houses" (a). In the case of the erection of such parliamentary districts into parishes *quoad omnia* under 8 and 8 Vict. c. 44, section 15, the provisions contained in these two statutes of 4 Geo.

(a) For these provisions see 5 Geo. IV. c. 90, s. 18.

IV. and 5 Geo. IV. cease and determine, and in lieu thereof it is declared that the burden of upholding the same "shall fall
 " on the parties who by the law of Scotland would be bound
 " to uphold " the manse of the parish.

SECTION XXV.—*Obligation to reside in and right to let
 Manse.*

109. A minister cannot be compelled either by the Presbytery or by the heritors to reside in his manse (a). He is entitled to let the manse to a suitable tenant. These rules, however, are subject to the obligation upon the minister to reside in his church and parish, or at all events within easy access of his church and parishioners, which is enforceable by his ecclesiastical superiors (b).

SECTION XXVI.—*Site of old Manse.*

110. In a case where the heritors had provided a new manse upon a new site on the glebe, the Court authorised the minister to feu the site of the old manse, offices, and garden, for behoof of the benefice, under reservation of the heritors' right to the materials of the old manse (c).

(a) Heritors of Pitsligo v. Gregor, 1879, 6 R. 1062.

(b) Inland Revenue v. Fry, 1895, 22 R. 422; Aberdour Heritors v.

Roddick, 1871, 10 M.P. 221; per Lord Young in Eckford School Board v. Rutherford, 1889, 16 R. at p. 382.

(c) Gloag, 1873, R. 187.

CHAPTER X.

ON GLEBES.

CHAP. X.

SECTION I.—*Enactments respecting Glebes down to 1644.*

Glebes of
Romish in-
cumbents
partially
appropriated
to Reformed
clergy.

1. Prior to the Reformation the extent of land possessed by Romish incumbents as part of the temporality of their benefices was not limited by any rule, and was often of very great amount and value. This condition of matters, however, did not survive the Reformation. Much of the accumulated wealth of the Church was appropriated by the Crown, the nobles, and others who, however anxious to further the cause of the Reformed religion, were not inclined to permit its ministers to succeed to the possession of their ecclesiastical predecessors. The claim to the entirety of the Church lands and revenues which was sometimes advanced by the Protestant clergy was refused by the Government; and the demand was recognised only to the effect of authorising the appropriation of the former incumbent's dwelling-house, and of a determinate and comparatively small portion of ground out of, originally, the glebe lands and subsequently the Church lands in each parish as the minister's manse and glebe. The amount of the latter provision and the mode of its allocation are referred to and more or less clearly specified in several statutes.

Acts 1563,
c. 72;

2. By the Act 1563, c. 72, which prohibits parsons, vicars and other churchmen, save with the Queen's consent in writing, to set in feu or long tacks their manses or glebes, it is, *inter alia*, provided that "sa-meikle land to be annexed to " the saidis dwelling-places of them that servis and minis- " teris at the kirk, as sall be hereafter with gude advisement " appoynted." "Na gude execution" having followed on

this Act, that of 1572, c. 48, declared that manses, whether belonging to the parson or vicar next to the church and most commodious, should belong to the minister or reader serving thereat,—

CHAP. X.

1572, c. 48

“together with four acres of land of the glebe at least, lying *contigue*, or maist ewest to the said manse, gif there be sa-meikle : and failzeing thereof, sa-meikle as there is to be marked and specialle designed be the Archbishop, Bishop, Superintendent, or Commissioner of the diocese or province, the time of their next visitation, be the advise of ony twa of the most honest and godlie of the parochiners, quhilkes he sall require (not being possessours of the said manses or glebes themselves) to joyne with him in execucion hereof, whether the saidis manses and glebes be set in few or takkes of befoire, or not.”

The Act also provided that on the application of the ministers or readers to the Lords of Council letters should be directed “charging the occupyars and possessours of the “ saidis manses and acres of land ” to remove therefrom and enter the minister or reader to the possession of the same within ten days, under pain of rebellion.

3. The Act 1592, c. 118, which extended the provisions contained in these two statutes to the case of cathedral and abbey churches, declared that besides a sufficient manse the minister appointed to the church was to be provided with—

“Four acres of land, of the best and maist commodious, lyand *contigue*, and maist ewest to said manse, quhilk perteinis, or in ony time of before pertained, to the said abbay, or ony member thereof : Quhidder the samine land lye within the said precinct, or without the same, gif there be sa-meikle, as may extend to the quantity of foure acres, to be designed, inhabit, occupied, laboured, manured ; conforme to the tenor of the Acte of Parliament.”

Referring to the alternative “quhair there hes bene na “ glebe of auld, or quhair there hes bene some of auld, zit it “ be farre within the quantity of foure aikers of land,” the Act 1593, c. 165, ordained that the designation of the glebe should be made out of the parson’s, vicar’s, abbot’s, or prior’s lands, and failing thereof, out of the bishop’s lands, friar’s

1593, c. 165 :

CHAP. X.

lands, or "ony uther Kirk landes" within the parish until the four acres were complete.

1606, c. 7.

4. On the narrative "that by the iniquitie of tyme and "disorder of the border and hielands of this realme in tyme "bygane," there are sundry kirks which have no arable land adjacent thereto, whereby sundry ministers are greatly hurt and defrauded, the Act 1606, c. 7 (*a*), provided that in time coming—

"There be designed to the minister serving at the cure of sik kirks where there is na arable land adjacent thereto, foure sowmes grasse for ilk aiker of the saids foure aiker of gleib land, extending in the hail to sextene sowmes for the saids foure aikers, and that of the maist commodious and best pasturage of ony Kirk lands lyand next adjacent and maist nearest to the saids kirks."

These Acts
rule of law
till 1644.

These statutes embraced the rules which regulated the designation of (manses and) glebes from the Reformation until nearly the middle of the seventeenth century, when the Act 1644, c. 31, was passed. Before alluding, however, to its provisions, certain points in reference to the above series of enactments which preceded it deserve notice, as explanatory of the state of our law in the matter of glebes during the period in question.

Import of Act
1572, c. 48.

5. The Act 1572, c. 48, appears to assume the existence within each parish of some land which, *qua* glebe, formerly pertained to a parson, or vicar, or other inferior churchman; and further, seems to confine the right of appropriating ground to the extent of four acres as a glebe for the minister, to an appropriation of ground of this amount out of such glebe lands alone. The statute 1592, c. 118, extended considerably the scope or range of the preceding enactment, by providing that in certain specified cases glebes might be allocated to the Reformed ministers out of lands (whether glebe lands or not is not specially mentioned) owned or occupied

Import of Act
1592, c. 118.

(*a*) Notwithstanding the circumscribed scope of its rubric, the provisions of this Act have been treated

as applicable to parishes generally throughout Scotland.

by the dignified clergy, as well as out of those of the inferior clergy. Recognising the extension of the law so introduced, the Act 1593, c. 165, prescribes the order of liability to allocation for ministers' glebes, of the lands belonging to or possessed by the different classes of the clergy, including vicars, parsons, priors, abbots, and bishops. There are a number of cases as to the order of liability to designation of the different kinds of Church lands under the earlier statutes (*a*). In a recent case, the matter, as one of historical evidence, was made a ground of judgment in the House of Lords (*b*).

Order of
allocation.

6. Although the expression "Kirk lands," as indicative of the source whence glebes were to be designed, does not occur in any of the four first-mentioned statutes (*c*), and is introduced for the first time into the Act 1606, c. 7, it seems sufficiently plain that the provisions of these Acts on this subject are confined to Kirk lands. The general tenor of the enactments in question point in this direction, and indeed it seems to proceed on the footing that it was the land formerly belonging to the Romish churchmen which was peculiarly and alone the source whence glebes for the new order of clergy were to be supplied. The provisions contained in the Act 1606, c. 7, indicate that, in the view of its framers, the kind of ground whence the four acres were, in virtue of the previous statutes, to be designed, was assumed to be *arable* as opposed to *pasture* land. Accordingly, it is only in the absence of arable land that the Act 1606, c. 7, introduces the alternative of designating a proportional amount of pasture land. The expressions used in the previous statutes are in harmony with this view (*d*). At the same time the *dictum* of the Court in the case of Merkinsh (*e*) indicates that while

Out of Kirk
lands.

Primo loco
arable lands,
failing which,
pasture.

Case of
Merkinsh.

(*a*) M. 5136 *et seq.* See *infra*, p. 440.

(*b*) Ogston *v.* Stewart, 1893, 21 R. 282, rev. 23 R. (H.L.) 16.

(*c*) Viz. 1563, c. 72; 1572, c. 48; 1592, c. 118, and 1593, c. 165.

(*d*) Thus the terms "laboured"

and "manured," as occurring in the Act 1582, c. 118, tend to support this assumption.

(*e*) Lammond *v.* Bennett, 1636, M. 5137; Dunfermline *v.* M'Gill, 1629, *ibid.* See also Nairn *v.* Boswall, 1629, *ibid.*, where, although the

CHAP. X.

the minister might be entitled to demand the designation of arable lands, if such existed, this was a condition in his *favour* which he could pass from at pleasure, without rendering the designation null on the ground that the lands were pasture lands.

SECTION II.—*Enactments respecting Glebes from 1644 to 1663.*

Act 1644, c.
31.

7. Such were the leading statutory provisions anent glebes in force prior to the Act 1644, c. 31. By this statute, which was passed during the second period of the temporary suppression of Episcopacy, power is conferred on Presbyteries to design glebes at every parish church within their bounds where none have been designed, or not to the full quantity, or where, if designed, they have—

“Become unprofitable by inundation, sanding, or any other extraordinary accident, *out of Kirk lands*, ewest to the paroch kirk, according to the order in the Act of Parliament in the year 1593 (c. 165), borrowstoun kirks being alwayes excepted ;” . . .
“where there is no Kirk lands or houses formerly belonging to parsons, vicars, or any other ecclesiastick persons within the paroch, or when the same are mortified to universities, schools, or hospitals, it shall be lawful to designe *out of whatsoever Kirk lands*, or *out of grasse* (when there is no arable land), most commodious and ewest to the paroch kirks, manses and glebes, according to the quantity contained in the former Acts of Parliament.”

The Act ordains that the whole heritors of the parish—

“Contribute proportionally for making’ recompense to the heritors out of whose lands the said manse and glebe shall be taken *respective*, viz., heritors of Kirk lands when Kirk lands are designed, and the heritors of all lands of other holding when the designation is of other lands not Kirk lands.”

The Act also authorises the heritors of any lands proposed to be designed nearest the church, not being Kirk lands, to offer for designation any other lands, “good and sufficient in

parson’s lands were feued out and built upon, the Court held that the minister had right to seek the same,

and that the feuars should either remove therefrom, or else provide another glebe to him.

“quantity and quality,” situated “within half a mile of the
“kirk or manse at farthest,” in lieu of the lands which would
otherwise be designed.

8. In reference to this statute, the following points may be noted as indicative of the changes on and the state of the law introduced by its provisions:—(1.) Jurisdiction in the matter of designing glebes, which by the Act 1572, c. 48, was formerly committed to the Bishops, was by that of 1644, c. 31, specially transferred to Presbyteries. (2.) This statute, which appears to assume that the kind of lands liable to designation under the previously existing law were *Church* lands, and further, *primo loco*, *arable* Church lands, extended the liability to designation, *qua* glebe, to *temporal* lands when no Church lands existed in the parish. (3.) The Act 1644, c. 31, apparently confirmed the right in favour of the minister under the Act 1606, c. 7, failing arable lands, to demand pasture lands for his glebe, at the rate of sixteen souns for the four acres of arable land. (4.) The statute authorised heritors to offer for designation lands situated anywhere within the distance of half a mile from the church or manse.

Jurisdiction
to Presby-
teries.

Temporal, in
default of
Church lands.

Pasture, in
default of
arable lands.

Option to
heritors.

9. After various enactments in regard to ministers' stipends and manses, and ministers' grass, the statute 1649, c. 45, provides that—

Act 1649, c.
45.

“Where gleibs are far distant from the manses, so that they cannot be conveniently laboured in respect of their distance from the manses, these gleibs shall be changed, and new gleibs designed more commodious and nearer to the manse, as good in quantity and quality as the former, the same being designed within a quarter of a mile at furthest from the manse, excepting always and exeeming villages and incorporate akers lying nearer the manse than the old gleibs, which are not liable to any designation of a gleib or any part thereof.”

Power is thereafter conferred by the statute on the Parliamentary Teind Commissioners to provide new glebes, and to determine the question of liability for and relief “of the

CHAP. X.

"burden of gleibs, horse and kyes grass, designed to be
"gotten of the remanent parochiners."

Jurisdiction
to Commis-
sioners.

10. The changes introduced by this statute were important, and may be summarised thus:—(1.) Jurisdiction was conferred on the Parliamentary Commissioners in certain circumstances, as above stated, to alter the site of the existing glebe, by making an exchange or excambion thereof for ground more conveniently situated for the minister, and equal in value and extent. (2.) Contiguity to the manse was made a governing criterion in the selection of ground for designation as the glebe. (3.) Lands situated in villages, or falling within the category of incorporate acres—although lying nearer the manse than the old glebe—were expressly exempted from liability to designation.

Contiguity to
manse.

Incorporate
acres excepted

Act 1663, c.
21.

11. The next statute is that of 1663, c. 21. After narrating that "diverse ministers are not yet sufficiently
"provided with manses and gleibs," and laying down rules for the building and repairing of manses, the statute proceeds to declare that "every minister have fewel, foggage, feal and
"devots according to the Act" 1593, c. 165, and that all ministers, save those of Royal Burghs, shall have grass for a horse and two cows besides their glebes, and explains the order to be observed in the designation thereof, and the relief competent to the heritors whose lands are taken. The only operative provision applicable to glebes proper which this statute contains is the following:—

"And because several kirks have no gleibs as yet designed to them, it is hereby specially provided, that in all designations of gleibs, incorporat acres, in village or town where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk."

This provision was perhaps intended to explain or correct a somewhat similar clause in the Act 1649, c. 45, which might possibly be read as exempting the owners of incorporate acres, or of lands within villages, from all liability in the matter of providing a glebe for the minister.

12. The Act 1663, c. 21, concludes with a declaration that “as to manses”—for the statute does not here mention glebes—it was to have force as if made on 14th March 1649, being the date of the Act 1649, c. 45, just mentioned. The Act 1644, c. 31, was, along with other statutes passed in that year, formally rescinded by the Act 1661, c. 15; and, although not therein specially mentioned, the Act 1649, c. 45, is also treated as having fallen under the operation of the above rescissory statute (*a*). The omission to specify *glebes* in the clause of the Act 1663, c. 21, ante-dating its operative effect, has been attributed to a mistake in the draft of the statute (*b*). Although any such explanation of its cause affords a very unsatisfactory warrant for supplying the omission, our Courts have, in construing the Act, practically done so—holding it to be highly improbable that the Legislature intended the statute to draw back as to manses and not as to glebes. While not, perhaps, very readily deducible from the terms of the Act 1663, c. 21, the view has been pretty generally adopted (*c*) that its object was, and its effect has been, to revive and re-enact the provisions contained in the two rescinded statutes of 1644 and 1649; and this principle of construction has been applied to explain and supplement the meagre provisions on the subject of glebes (as opposed to ministers’ grass) contained in the enactment of 1663, c. 21. The Act 1663, c. 21, as interpreted by decision and practice, appears therefore to embrace within its scope the provisions contained in the Acts 1644, c. 31, and 1649,

CHAP. X.

Retrospective
clause.How Act 1663,
c. 21, con-
strued.

(*a*) On this subject Sir George Mackenzie, in his “Observations,” p. 393, says,—“After this Parliament (1661) had rescinded some private Parliaments, they considered that all the Parliaments, from the year 1640 till the year 1650, were but branches of one and the same rebellion; and therefore they did annul them all by this Act 1661, c. 15, which is called the Act “Rescissory.”

(*b*) See argument in *Watson v.*

Law, 1667, M. 16,588, as reported by Stair. In this case the Court observed that the drawing back of the Act 1663 (printed by mistake 1661), “being expressly as to manses, which is adjoined as a limitation, could not be extended to the minister’s grass, which is situated in a different way in this than in the Act” 1649.

(*c*) Stair, ii. 3, 40, and Ersk. ii. 10, 59.

CHAP. X.

29 and 30
Vict. c. 71.

c. 45, and along with them and the Act 1606, c. 7, to form the *regula regulans* on the subject of glebes as well as of manses (*a*). From this date no statute specially applicable to glebes occurs until 1866, when the 29 and 30 Vict. c. 71, to facilitate the letting on lease, feuing, or selling of glebe lands, was passed. Subject to the change so introduced on the former limited powers of disposal by the incumbent of this part of his benefice, the law generally, in regard to glebes, is still governed by the provisions contained in one or other of the various old statutes now mentioned.

SECTION III.—*What Parish Ministers are entitled to Glebes?*

Minister of
a landward
parish
entitled to a
glebe.

Case of
Brechin.

13. The incumbent of every proper landward parish is entitled to a glebe. Among various cases, which recognise or involve the existence of the right in question, may be mentioned the case of Brechin (*b*), where it was ruled that the first minister of a burghal-landward parish was entitled to a glebe. The ratio of the judgment implies that the *first* minister of a landward parish, if such a charge was ever collegiate, would likewise be entitled to a glebe, and if the *first*, then impliedly *the* minister, when, as is almost invariably the case, the charge of such parishes is single.

Minister of a
burghal parish
not entitled.

14. From the provisions of the Act 1644, c. 31, which conferred power on Presbyteries to design glebes to ministers of parishes within their bounds, "borrowstoun kirks" are specially excepted. By this phrase, as is elsewhere explained (*c*), is understood burghal as opposed to burghal-landward parishes; and the Act excludes the ministers of all burghal parishes from any claim to or in respect of a glebe. The clause in the Act 1663, c. 21, already quoted, does not qualify this exemption. It declares that incorporate acres

(*a*) The validity of the reasoning by which the Act of 1644 has been held to have been revived by that of 1663, is doubted by Lord M'Laren in *Magistrates v. Presbytery of Arbroath*,

1883, 10 R. 767. Sequel, 20 S.L.R. 781. But see note (*a*), p. 438, *infra*.

(*b*) *Pannmure v. Presbytery of Brechin*, 1855, 18 D. 197.

(*c*) See *ante*, p. 359.

in villages and towns, where the heritor has houses and gardens, are not to be designed, with the important qualification—which creates or still recognises a certain liability on the heritor's part—viz. “he always giving other lands “nearest to the kirk.” It is in accordance, however, with the terms of the clause in question, and consistent with the probable intention of the Legislature, to read it as applicable to the case of a burghal-landward rather than of a purely burghal parish; and this view coincides with the doctrine distinctly expressed in the cases of *Dysart* (*a*) and of *Brechin* (*b*) and *Arbroath* (*c*), viz. that the incumbent of a purely burghal parish is not entitled to a glebe.

Cases of
Dysart,
Brechin, and
Arbroath.

15. In the passage from Lord Curriehill's opinion in the *Brechin* case cited in the note, the doctrine is rested on necessity,—the assumption being that in no case of a purely burghal parish does unoccupied arable or pasture land exist within it which is liable to designation for a glebe. In some cases this is consistent with the state of possession of ground within a purely burghal parish, and may be a sufficient reason for the rule, but there was at one time much unoccupied land within burghal parishes. Whatever be the reason of the rule, the designation of a glebe to the minister of a purely burghal parish is expressly excluded by the terms of the Act 1644, c. 31 (and constructively of that of 1663, c. 21), which specially reserves from its provisions “borrowstown kirks.” The rule therefore applies even in those instances where lands not otherwise exempted from liability to designation *qua* glebe exist within the confines of a purely burghal parish, and it was so decided in the *Arbroath* case just cited.

Ratio of the
rule in regard
to burghal
parishes.

(*a*) *Anderson v. His Parishioners*, 1664, M. 5121.

(*b*) Per Lord Curriehill in *Pannure v. Presbytery of Brechin*, *supra*, 18 D. 197, who says (p. 203),—“Now there are only two exceptions to those who are entitled to glebe:

“First, ministers of burghal parishes, where, from the necessity of the case, a glebe cannot be designed to them,” &c.

(*c*) *Magistrates v. Presbytery of Arbroath*, 1883, 10 R. 767. Sequel, 20 S.L.R. 781.

CHAP. X.

Minister of a burghal-landward parish entitled to a glebe.

Cases to this effect.

First minister when charge collegiate.

Case of Brechin.

16. The Act 1649, c. 45, is so expressed as to indicate that its provisions in regard to the designation of manses apply to burghal-landward parishes, and confer on their incumbents right to a manse. The provisions of this statute, as well as of that of 1644, c. 31, *quoad* the designation of glebes, may be held equally to apply to such parishes. On the footing, therefore, that the provisions of these Acts are re-enacted in the statute of 1663, c. 21, the result is reached that the minister of a burghal-landward parish is entitled to a glebe. This is directly affirmed by the cases of Dysart (*a*), Kirkcaldy (*b*), Irvine (*c*), and Dunfermline (*d*), and is directly or by analogy supported by the case of Linlithgow (*e*), which related to a manse—the law as to manses and glebes being substantially the same (*f*). It was stated from the Bench, in the case of Cupar (*g*) in 1816, to be then an unsettled point whether the first minister of a collegiate landward-burghal parish was entitled to a (manse or) glebe. This point, however, cannot now be regarded as doubtful after the judgment in the case of Brechin (*h*), which must be regarded as firmly fixing the rule in the affirmative. Here—the parish being burghal-landward and the charge collegiate—the Court held that the first minister was entitled to have a glebe designed to him, notwithstanding the circumstance that a designation had been already made by the Presbytery of a glebe to the predecessor of the incumbent of the second charge, with the concurrence of the then incumbent of the first charge, and in consequence of an arrangement on his part with his colleague, whereby he expressly waived his claim to the glebe so designed.

(*a*) *Anderson v. His Parishioners*, 1664, M. 5121.

(*b*) *Williamson v. Ramsay*, 1685, *ibid.*

(*c*) *Fullerton v. Richmond*, 1779, M. 5123.

(*d*) *Minister v. Heritors of Dunfermline*, 1805, M. *Manse*, Appx. 1; affd. 1812, 5 Paton, 593.

(*e*) *Dobie v. Heritors of Linlithgow*,

1802, mentioned in note to last case, M. *Manse*, Appx. 1; see also *Magistrates v. Presbytery of Arbroath*, *cit. supra*.

(*f*) See per Lord Robertson in *M'Callum v. Grant*, 1826, 4 S. at p. 529.

(*g*) Per Lord Succoth in *Adamson v. Paston*, 14th Feb. 1816, F.C.

(*h*) *Pannure v. Presbytery of Brechin*, *supra*, 18 D. 197.

17. In the later case of Brechin (*a*) it was stated from the Bench that the case of Cupar (*b*) “does not decide that in no “circumstances can a second minister be entitled to a glebe.” At the same time the argument there submitted on both sides was an argument on the general point of law involved in the construction to be put on the statutes (*c*). It was not rested on any supposed specialties in the case, nor does the judgment pronounced seem to have proceeded on such a footing. On the contrary, it appears from the report of the case to have been a judgment on the abstract question. In these circumstances, and in the absence of any instance in which a glebe proper has been formally designed to the second minister of a collegiate charge (*d*), it appears that the second minister of a collegiate charge is not entitled, under the Act 1663, c. 21, or prior relative statutes, to a glebe.

Second minister when charge collegiate. Argument in the case of Brechin.

SECTION IV.—“*The Glebe,*” and of what it consists.

18. The glebe, or, as it is sometimes termed, the “glebe “proper,” in contradistinction to “minister’s grass,” consists of a portion of arable land situated within the parish, and

Arable character of the ground.

(*a*) *Panmure v. Halkett*, 1860, 22 D. 1357, per Lord Deas, p. 1392.

(*b*) *Adamson v. Paston*, *supra*.

(*c*) With reference to the statutory provisions, the minister contended that the Acts anent manse and glebes were passed at a time when the Legislature did not foresee that it might become necessary to appoint two ministers to one parish; that their provisions were intended to be, and were eminently, in favour of the parochial clergy; that there was no distinction in principle, and ought to be none in fact, between a parish with a double charge and separate parishes created with an endowed incumbent to each — their overpopulousness being the reason for both expedients; and that to provide a manse and glebe to the second minister of a collegiate charge was really a lighter burden on the heritors than that imposed on them by the

disjunction of a district and its erection into a new parish, which, in addition to these burdens, frequently entailed on the heritors the burden of erecting and maintaining a church.

(*d*) *Panmure v. Presbytery of Brechin*, 1855, 18 D. 197, Lord Colonsay (then Lord President) and Lord Deas remarked that they knew of no such instances. Cases, however, are to be met with in which the second minister of a double charge has *de facto* enjoyed a glebe. An example to this effect occurs in *Procurator for Church v. Officers of State*, 1828, S. T. 148, where, on the annexation of the parish of Alloway to that of Ayr in 1690, the magistrates of Ayr, “alloted” to the second minister of the charge, which was made collegiate, the glebe of the former parish. The minister of the second charge, Culross, has a glebe.

CHAP. X.

Four acres
in extent.

Irrespective
of manse
ground.

Must glebe be
enclosed?

extending to four acres. That the character of the ground to be designed as a glebe proper is to be *arable* is deducible from the general scope and language of the several statutes (*a*). The first notice of the extent of ground designable as a glebe occurs in the Act 1572, c. 48, which declares that the manse of the parson or vicar situated next the kirk shall pertain to the minister, "together with four acres of land of the glebe "at least" lying adjacent to the manse. In the next Glebe Act, 1592, c. 118, the qualifying words "at least" are omitted, and the extent of the legal provision is stated at "four acres of land." This quantity is again specified in the Act 1606, c. 7, and is not altered by any subsequent statute. As at the date of the Acts alluded to the legal standard of measurement was Scots, it seems to follow, in the absence of statutory declaration to the contrary, that the legal size of a glebe is equivalent to four Scots acres (*b*). This quantity of ground is irrespective of the half acre assigned as manse ground, which is regarded as an independent provision. Hence, as has been observed, the minister "can ask no "addition (to his glebe) because the manse ground is less "than half an acre; and if he has more than half an acre for "manse ground, *that* will not hinder him from getting four "acres for glebe" (*c*).

19. None of the statutes anent glebes contains any requirement to the effect that the ground designed as glebe should be fenced or enclosed by the heritors, and no decision imports that walls or fences constitute an integral part of the glebe. In the case of the manse garden, a wall, or enclosure of some kind, has been repeatedly recognised as a necessary or proper adjunct thereof (*d*). On a somewhat similar principle it might possibly be inferred that, where a

(*a*) On this subject the reader is referred to the terms of the Acts 1572, c. 48; 1592, c. 118; 1606, c. 7; 1644, c. 31; and 1649, c. 45; and to the remarks *ante*, p. 419.

(*b*) Modern legislation as to weights

and measures has no bearing upon the question.

(*c*) Per Lord Kennet in *Grierson v. Ewart*, 1778, 2 Hailes, 799, foot.

(*d*) *Ante*, p. 376.

dyke or fence is essential to the beneficial use of the ground *qua* glebe, the burden of erecting such enclosure would, on the designation of the ground, devolve on the heritors (*a*).

20. In the case of Kippen (*b*), on the occasion of designat- Entrance to
ing an addition to the glebe, the Presbytery appointed the glebe.
entry thereto to be twenty feet broad. In an advocacy this decerniture was objected to on the ground that the breadth of the road as required to be made was excessive, being equal to that prescribed for highways under the Act 1661, c. 38. The heritor, however, did not disclaim liability to make an access to the glebe. Such an obligation may possibly arise under the requirement to designate with "frie ischue" and entry" to the glebe as contained in the Act 1593, c. 165; but apart from statute, it may be derived from principles of common law.

SECTION V.—"*Grass Glebe*," *what and when designable*.

21. When there is no arable land liable to designation, or Pasture in lieu
not the full quantity of four acres lying adjacent to the of arable land.
parish kirk, the provisions of the Act 1606, c. 7, apply, in virtue of which the minister is entitled to "four sowmes" grass for ilk aiker of the saids foure aiker of gleib land, "extending in the hail to sextene sowmes." When this alternative provision of souns of grass is awarded to the minister, then the glebe is distinctly termed a "grass" glebe" (*c*), as in contradistinction to a glebe proper, or of arable land on the one hand and to "minister's grass" on the other.

22. The alternative proposition at the outset of the pre- Provision
ceding paragraph coincides with the construction above put subsidiary,
not optional

(*a*) Rankine, Land Ownership, 647.

(*b*) Potter v. Ure, 1710, M. 5129.

(*c*) The phrase "grass glebe" is frequently used to signify "minister's" grass," *i.e.* grazing for a horse and two cows, as well as the souns of

pasture designed as glebe in lieu of arable land. In this volume, however, the phrase in question is intended to signify souns of pasture land only.

CHAP. X.

on the Act 1606, c. 7, viz. that its provisions come into operation in the case not only of an entire absence, but also of a partial deficiency of four acres of designable arable Church land adjacent to the parish church. This alternative provision appears to be *subsidiary* rather than *optional* in its nature, as it is only in the absence or in default of arable land (*a*) that the statute authorises the designation of souns of pasture land. This view of the character of the provision is consistent with the terms of the Lord Ordinary's remit in the case of Barvas (*b*), and coincides with the principle adopted in awarding the monetary allowance of £20 Scots per annum in lieu of minister's grass (*c*).

Soun, *quid* ?

23. The term sowme, soume, or soun, is expressive of a quantity of ground indicated in point of extent by its capability to pasture a certain number of cows or sheep. The precise number does not seem to be fixed. According to Erskine (*d*) a soun is what will graze ten sheep or one cow ; according to Jamieson (*e*), one cow or five sheep, and in some places ten sheep. In the two cases of Barvas (*f*) the Court expressed and adopted the view that in determining in a particular instance the extent of a soun, the custom of the district must to a considerable extent regulate the matter. In the former of these cases the Court fixed a soun at what would pasture one cow with her calf until a year old, and it was observed "that in dairy counties, where the produce of " the cow is realised in milk and butter, it would, in point of " fact, require as much pasture to feed a cow without a calf, " but milked daily, as in breeding districts to feed a cow and " her calf."

Custom of district.

(*a*) In the language of the Act 1606, c. 7, "Where there is no arable "land adjacent thereto," *i.e.* to the parish church.

(*b*) See *M'Neill v. Nicolson*, 1828, 6 S. at p. 424.

(*c*) See *post*, CHAPTER XI.

(*d*) *Ersk. Inst.* ii. 10, 59, foot-note, and *Prin.* i. 5, 16.

(*e*) Jamieson's *Scottish Dictionary*, voce "soun."

(*f*) *M'Kenzie v. M'Crae*, 1825, 4 S. 146, and *M'Neill v. Nicolson*, 1828, 6 S. 422.

SECTION VI.—*Meaning of term “Arable” quoad designation of a Grass Glebe.* CHAP. X.
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24. As it is only in default of “arable” land that pasture land can be appropriated for the glebe, it will be convenient here to point out the distinctive meanings attached to this somewhat flexible term. The phrase “arable,” when applied to land, is susceptible of at least four several interpretations, all of which differ from each other in an appreciable degree. Thus “arable ground” may mean either—1st, ground that is capable of being ploughed; 2nd, ground that has been formerly subjected to tillage; 3rd, ground that is in course of being cultivated or is under cultivation; and 4th, ground which, although not actually or ever under cultivation, is “exceedingly fit for ploughing” (a), and which might in ordinary times be cultivated with profit. Four meanings of the term.

25. In former times, and until long after the last of the series of old Acts anent glebes above enumerated, viz. that of 1663, c. 21, the recognised agricultural division of land throughout Scotland generally was (1) croft or infield; (2), outfield; and (3) pasture, which was generally held in common. The croft or croft infield (b) land, which was that immediately adjacent to the mansion or farm-steading, was kept in constant cultivation by cropping—all or most of the dung derived from the farm being bestowed on this ground. The outfield land lay at a greater distance from the farm-steading and was much more sparingly manured and cultivated; but, according to its natural capabilities, it was occasionally ploughed, and after a crop was obtained from it the land was rested and allowed to lie in lea for a long period before being again disturbed. During these periodical rests the land was occupied as grazing ground. The pasture land, distinctively so called, when such was attached to a Old division of farm lands.

(a) Per Lord Monboddo in *Grierson v. Ewart*, 1781, 2 Hailes, 888.

(b) This is the term used in the Act 1606, c. 8.

CHAP. X.

Tendency of
outfield
to infield.

farm, meant ground which was never ploughed and was more or less adapted for and confined to grazing cattle.

26. In some instances land was used exclusively as pasture because it was not susceptible of cultivation, while in other instances it was so used although susceptible of and even well adapted for tillage. The outfield land attached to one farm was more frequently or more regularly ploughed than that attached to another, and in the progress of time the tendency was to extend the range of the infield land by the more frequent cultivation of the outfield, thus impressing upon it, if it did not possess it before, the character of arable land in the most unequivocal sense of the term (*a*).

Decisions as
to "arable."

27. Most of the decisions which bear on the meaning of the term "arable land" relate to its use in the Act 1663, c. 21, in connection with the designation of "minister's grass." In the old case of *Dunfermline v. McGill* (*b*), however, which relates evidently to a "grass glebe," the Court held as irrelevant to imply liability to designation as arable land the averment that the ground "*might* be tilled and was com-modious to that use." This *dictum* seems to import that actual present or previous cultivation was regarded as essential to impress it with the character in question. In the subsequent and much more recent case of *Barvas* (*c*), which also relates to a "grass glebe," under a remit on the subject, it was reported that there were not four continuous acres of land in the parish "fit for the operation of the plough." In these circumstances the Court appear to have recognised as arable "certain small patches of arable land interspersed through the glebe, and which was in use to be cultivated in rotation with a kind of crooked spade."

De facto
cultivation.

(*a*) On the subject of infield and outfield land, see per Lords Kaimes, Braxfield, and Monboddo in *Grierson v. Ewart*, *supra*, 2 Hailes, 801, 888-9; per Lord President Inglis (then Lord Justice-Clerk) in *Strang v. Steuart*, 1864, 2 M.P. at p. 1031; per Lord

Justice-Clerk Patton in *Macmillan v. Presbytery of Kintyre*, 1867, 6 M.P. at p. 39. See also *The Monastery*, chap. i.

(*b*) 1629, M. 5137.

(*c*) *M'Kenzie v. M'Crae*, 5th July 1825, 4 S. 146 and F.C.

28. Neither of these decisions, however, is very conclusive as to the precise meaning attachable to the term "arable" under the Act 1606, c. 7; and it would appear that the true meaning of the term, *quoad* the designation of a grass glebe, is referable rather to the suitability and ready adaptability of the ground for tillage, than to the actual mode of present or even recent occupation. In consonance, apparently, with this view, are the subjoined *dicta* by two of the Judges in the case of Kilcalmonell (*a*).

SECTION VII.—*Nature of the provision of a "Glebe."*

29. The term "glebe" may be used in two senses—one in the strict legal interpretation of the expression as occurring in the old glebe statutes already mentioned, and the other in a more popular or common acceptation. Used in its former sense, the glebe, whether consisting of arable land or souns of grass, is in its nature a compulsory or enforced as opposed to a voluntary provision in favour of the minister; and is appropriated, as part of the temporality of the benefice, to the use without any pecuniary payment therefor of the successive incumbents of the cure. The distinction now pointed at is alluded to in the case of Brechin (*b*), and is illustrated by the case of Stranraer (*c*). Here, certain lands which had been feudally acquired by Mr. Lawrie when

Provision for
successive
incumbents.

Compulsory
as opposed to
voluntary
provision.

Case of
Stranraer.

(*a*) *Macmillan v. Presbytery of Kintyre*, 1867, 6 M.P. 36, where Lord Justice-Clerk Patton remarks (p. 40),—"It would seem to me opposed to the statute if such ground were taken as grass. I hold that being *de facto* croft-land, and used as such for forty or fifty years, it is not the kind of ground which the statute rendered subject to designation for grass. I think it is precisely the kind of ground to which a minister would be bound to take as his arable glebe;" and Lord Benholmesays (p. 41),—"On the other hand, I should certainly hold lands to be arable if from the rich nature of the soil they are manifestly adapted for

"cultivation, although peculiar circumstances have prevented them being cultivated."

(*b*) *Panmure v. Presbytery of Brechin*, 1855, 18 D. 197, where Lord Colonsay (then Lord President) remarks, p. 200,—"There may have been cases where the second minister has had a glebe, as the word is sometimes used—a piece of land for his support—but no case in which there has been a proper glebe assigned to him." See also per Lord Glenlee in *Wilson v. Officers of State*, 1826, S. T. at p. 94.

(*c*) *Wilson v. Agnew*, 1831, 9 S. 357.

CHAP. X.

minister at Stranraer were, in 1736, voluntarily disposed by him "to his successor in office," and the kirk-session of the parish as trustees, for certain uses, and in particular to be possessed as a glebe by the minister for the time, he being bound to enter with the superior and pay a relief as on the entry of a singular successor. In a process of augmentation by the minister of an adjacent parish within which the ground was situated, it was, *inter alia*, found that the then minister of Stranraer, the possessor of the lands, was liable to be localled on for teind furth thereof, in respect that they did not constitute a glebe in the sense of law (*a*).

Either arable
or pasture.

30. Again, the term "glebe," used in the legal sense, may mean or imply either a provision of (1) four acres of arable land appropriated as part of the temporality of the benefice, or (2) sixteen souns of pasture land allocated in lieu of the above quantity of arable ground. The designation of a grass glebe, although made with special reference to, includes something more than a right of pasturage merely, and is not to be confused with "minister's grass." It involves in the ordinary case, just as does the designation of a glebe proper; the idea of direct appropriation for the use of the incumbent of a determinate quantity of ground, exclusive of its use or occupancy by other parties—the main distinction between the two provisions consisting in the different character, quality, or use of the soil. The case of Barvas (*b*), however, affords an example of a departure, to a partial extent, from the principle of the exclusive appropriation to the benefice of the ground allocated as a grass glebe. Here the Court awarded to the minister, *qua* grass glebe, so much only of the ground as, along with a mere right of pasturage over certain other

Case of
Barvas.

(*a*) By 1578, c. 62, ministers are exempted from payment of teind in respect of their glebes, and by 1621, c. 10, this exemption is made to apply to grass glebes. In *Burnet v. Gibb*, 1676, M. 15,640 and 15,717, and 1 Br. Supp. 752, a piece of ground

voluntarily mortified to a chapel was, *qua* glebe, held teind free; but the facts are obscure and the decision is dubious.

(*b*) *Mackenzie v. Macrae*, 1830, 8 S. 683.

lands (enjoyed by him in common with other parties), afforded in all sixteen souns of grazing throughout the year. The arrangement here adopted, however, was entirely attributable to the exceptional mode of pasturing their cattle practised by the tenants in the district (*a*).

31. As was found in the case of Stranraer (*b*), the term "Glebe" as used in the Small Stipend Act, 5 Geo. IV. c. 72, is construable in its popular sense. Here the minister, in respect that his stipend was under £200 a year, and that he had no manse or "glebe," applied under the statute for payment of a sum by way of compensation. Although without any *legal* manse or glebe, he possessed, *qua* incumbent, thirty acres of land, with certain houses thereon, which had been mortified by a predecessor in the benefice to his successors in the cure in respect of the want of a manse and glebe. In these circumstances the Court refused the minister's demand for compensation for the alleged want of a glebe on the ground that, although he had no legal glebe, yet he had a proper or sufficient provision of land within the intendment of the Legislature. To fall within the meaning of a "glebe" under the Act it is not necessary that the lands provided to the incumbent should be situated within his parish (*c*).

SECTION VIII.—*Whence and by whom the Glebe is to be provided?*

32. From the provisions of the various statutes anent glebes which preceded the Act 1606, c. 7, it would appear

Originally from churchmen's glebes.

(*a*) The district in question was situated in the island of Lewis, and consisted of certain low-lying ground, and upland ground on the hill of Barvas. According to a practice which there prevailed, the tenants were in use to pasture their cattle for six weeks in the summer on high ground. By a judgment pronounced in a previous stage of the case (1825, 4 S. 146), the Court adopted the principle that in the designation of the glebe the custom of the county

was to be followed. This interlocutor had become final when the case came before the Court on the second occasion, and in respect of its finality apparently, and of this alone, the Court (*diss.* Lord Cringletie) allocated a right of common pasture to the minister *in computo* of his grass glebe, as mentioned in the text.

(*b*) *Wilson v. Officers of State*, 1826, S. T. 88.

(*c*) *Ibid.* per Lord Justice-Clerk Boyle, p. 95.

CHAP. X.

that glebes for the Reformed ministers were designable only out of lands which at the time belonged, or formerly had belonged or were possessed by, the inferior or dignified order of the Prelatic clergy. The Act 1606, c. 7, which introduces the alternative provision of a "grass glebe" in default of arable lands, still recognises "Kirk lands" as those whence alone the soums of grass were to be obtained, and ordains "letters to be directed against the possessours thereof for removing therefra," as provided by the Act 1572, c. 48.

Right of
relief by 1594,
c. 202.

33. The earlier Acts do not confer any right of relief in favour of the heritor whose lands are taken against his co-heritors; and it was not until the Act 1594, c. 202, that any such right of relief was introduced. On the narrative of its absence from previous statutes, and the injustice thence arising, this Act ordained that—

"Where designation of manses and gleibes beis maid and tane of Kirk land (the hail parochin, or ane great part thereof being Kirk land, and the minister notwithstanding designed to the Kirk land maist ewest and adjacent to the kirk), that the fewars, possessours, and tackesmen, out of quhais landes the manses or gleibes are designed, sall have their reliefe of the remanent parochiners quha are fewars, possessours, and tackesmen of Kirk landes, lyand within the said parochin *pro rata*."

From Kirk
or temporal
lands by 1644,
c. 31.

34. The only lands liable to designation as glebes continued to be Church lands until the Act 1644, c. 31, introduced, *inter alia*, this important change in the law, viz. that in default of such lands the designation of the glebe should be made "out of whatsoever other lands, or out of "grasse (where there is no arable land), most commodious "and ewest to the paroch kirks." The Act also provided that the owners of the lands selected for designation as a glebe should have relief against the heritors of the parish thus, viz. "heritors of Kirk lands, when Kirk lands are "designed, and the heritors of all lands of other holding, "when the designation is of other lands nor Kirk lands."

Right of
relief.

Import of
1663, c. 21.

35. The Statute 1663, c. 21, also contains a clause of relief "according to the former Acts of Parliament" in force,

which, although standing in immediate connection with that applicable to the designation of "minister's grass," was perhaps intended to refer also to the clauses of relief applicable to the designation of glebes proper, and grass glebes, occurring in the Acts 1594, c. 202, and 1644, c. 31, just referred to. In any view this construction has been practically adopted; and the result is that lands generally are—subject to a certain order of selection—eligible for designation as the "glebe" or "grass glebe;" that the owner of such lands so selected is liable to furnish ground for the glebe; and that, in respect of the right of relief competent to him, the heritors of the parish who are proprietors of the same class of lands—Kirk lands or temporal lands—as that whence the glebe is designed are the persons who are ultimately liable in the burden of supplying the minister with a glebe.

Heritors liable
to provide
lands.

SECTION IX.—*Order of liability of Lands to designation.*

36. While the Act 1644, c. 31, introduced the liability of temporal lands to be designed for a glebe, it did so in terms which import that this liability was conditional on there being no Church lands in the parish, or none which were not mortified to universities or hospitals. Neither of the subsequent statutes of 1649, c. 45, and 1663, c. 21, appears to contain anything inconsistent with this construction of the previous Act, or which operates a change in its said provision. Accordingly, Stair (*a*), Bankton (*b*), Erskine in his Principles (*c*), Bell (*d*), and Dunlop (*e*) concur in saying, or implying, that there is no warrant in any of these statutes to design temporal lands when there are any Church lands in the parish. On the other hand, in his Institutes (*f*), Erskine seems to indicate the view that the Act 1644, c. 31, which he regards as practically re-enacted by that of

Dicta on the
subject by
Stair,
Bankton, and
Erskine, &c.

(*a*) Stair, ii. 3, 40, and case of Forret v. Matters, 1678, M. 5139, cited by Hare, and also referred to in Connell Par. 365.

(*b*) Bank. ii. 8, §§ 120, 122.

(*c*) Ersk. Prin. i. 5, 16.

(*d*) Bell's Prin. 173.

(*e*) Dunlop, 120.

(*f*) Ersk. ii. 10, 59.

CHAP. X.

1663, c. 21, abolished all distinction in the matter of designing glebes between Church lands and temporal lands, *i.e.*, rendered both classes of lands indiscriminately liable to designation. While such a doctrine may appear to derive some confirmation from the judgment in the second case of Kingsbarns (*a*), this judgment was, and bears to have been, pronounced with reference to the special circumstances which there occurred, and, as has been authoritatively stated (*b*), does not support the above general doctrine, notwithstanding a very distinct statement to this effect by Connell (*c*). The opinion of Lord Corehouse in the case just cited, that where there are Church lands temporal lands cannot be designed is, it is thought, sound law.

Case of
Kingsbarns.

37. The case of Kingsbarns was to this effect:—Part of the parish of Crail having been erected into the parish of Kingsbarns, the minister thereof, in 1720, applied to have a glebe designed to him. At a meeting of the Presbytery called for this purpose, the heritors, by a written agreement, obliged themselves and their heirs to pay the minister and his successors £60 Scots annually in lieu of a glebe, according to their valued rents. This arrangement was acted on till 1790, when, on an application by the then incumbent, the Presbytery designed to him a glebe out of certain temporal lands adjoining the manse. The heritors of these lands brought this deliverance under review of the Court in a suspension; and in this process (*d*) the Court found that temporal lands could not be designed for a glebe when there were

(*a*) Minister of Kingsbarns *v.* Hay, 1799, *M. Glebe*, Appx. 2. Here the Court found “that in the circumstances of this case the minister has right to have his glebe designed out of lands lying near to his manse, whether they be Kirk lands or temporal lands.” In *Magistrates v. Presbytery of Arbroath*, 1883, 10 R. 767, sequel 20 S.L.R. 781, Lord M'Laren doubts whether there is any statutory warrant for the designation of temporal lands under any circum-

stances, but whatever be the warrant, the continuous volume of authority in the affirmative, extending over two centuries, seems to make it matter *positivi juris* that such lands may be designed.

(*b*) Per Lord Ordinary Corehouse in *Magistrates of Montrose v. Scott*, 1832, 10 S. at p. 212.

(*c*) Connell Par. p. 370.

(*d*) Being the first case of Kingsbarns, viz. *Minister of Kingsbarns v. Erskine*, 1794, *M.* 5140.

Church lands in the parish. Adopting but misapplying this principle, the Presbytery designed a glebe out of Mr. Hay's lands, which afterwards turned out to be temporal lands. Hay having suspended this deliverance, the Court refused the note of suspension. Thereupon he presented a petition against this interlocutor, in which, founding on the terms of the decree of disjunction and erection, and on the subsequent conduct and proceedings of parties, he pleaded that the burden of providing a glebe should be borne by all the heritors indiscriminately, without reference to the character of the lands according to their valued rents. To this plea, which depended on the written agreement mentioned, the Court gave effect, and, from the terms of their interlocutor above quoted, evidently in respect of the agreement.

Judgment
rested on the
agreement.

38. As is fully explained in the succeeding paragraphs, the result of the decisions and *dicta* there mentioned seems to indicate that the principle adopted in the selection of lands for the "glebe," or the "grass glebe," is this, viz. Church lands are liable to designation in the first instance, and—when such a distinction between them is traceable—these lands are subject to selection according to the rank of the ecclesiastic to whom they of old belonged, as prescribed by the Act 1593, c. 165. Failing Church lands, temporal lands will be selected.

General rule
stated.

39. During the period when Church lands only were liable to be designed as a glebe—viz. from the Reformation till the passing of the Act 1644, c. 31—the selection of a particular portion of ground was determined first and mainly according to the particular order of churchmen to which the ground belonged, and next, but in a subordinate degree or to a qualified extent, by its situation *quoad* the parish church. Under the former principle of allocation, as specified in the Act 1593, c. 165, lands were liable to designation in the following order, viz. (1) parsons' or vicars' lands; (2), abbots' or priors' lands; failing these, then (3) bishops' or friars'

Liability of
Kirk lands
inter se.

CHAP. X.

lands; and (4) "ony uthir Kirk landes" in the parish, as, for instance, chaplainry lands or those belonging to common kirks. The principle of this order of liability has been explained thus:—The lands of Romish parsons and vicars were liable in the first instance, because the Reformed parochial clergy came in their place, and got right to their manses and glebes by prior statutes. Abbots' and priors' lands were made liable in the next place, because most of them had been gratuitously disposed by the Crown in favour of laymen; while those of bishops were only liable *subsidiarie*, because, in the view of restoring it to them, no grants of their property by the Crown had at that time been given. Common kirks were, by the subsequent Act 1594, c. 199, put on the same footing as parsonages and vicarages; and it is probable that after its date lands belonging to them were liable to designation *pari passu* with parsons' and vicars' lands. Subject to this remark, various examples of the application to Church lands of the rules of liability to designation contained in the Act 1593, c. 165, occur in the early decisions.

Examples of
application
of rule.

40. In the case of Dysart (*a*), parsons' lands, although feued out prior to the Act 1572, c. 48, and built on with houses incorporated with the town, were made liable to designation before bishops' lands. In *Nairn v. Boswell* (*b*), parsons' lands—although the ground was feued out and built on—were held liable to designation for a glebe before abbots' lands, to the effect of compelling feuars to remove therefrom, or else to provide another glebe to the minister (*c*). In *Nicolson v. Porteous* (*d*) it was ruled that abbots' lands were liable to be designed before bishops' lands, although the

(*a*) Parson of Dysart *v.* Watson, 1565, M. 5139.

(*b*) 1629, M. 5137.

(*c*) Against the proposed allocation, it was contended that the glebe being built upon, and so not arable, was not liable to be designed. This plea,

however, was overruled. This decision, which was pronounced long prior to the Act 1644, c. 31, bears to proceed on the provisions of the Statute 1572, c. 48.

(*d*) 1622, M. 5136.

latter were nearest to the manse (and, inferentially, the church). It was here pleaded, and apparently with success, by the owner of the bishops' lands, that the condition of "maist ewest" to the kirk, in the Act 1572, c. 48, applied only to parsons' and vicars' lands, when such lands existed in the parish. In the case of Kinnoull (*a*) the Court decided that abbots', priors', or bishops' lands were liable to designation before chaplainry lands, although in this instance these latter lands were nearest the church, and the former three miles distant therefrom.

'Maist ewest to the kirk.'
Application of condition.

41. In this case it was observed from the Bench that the statutory condition of proximity to the kirk meant relative proximity as between portions of lands belonging to the same order of churchmen, not to different orders. This principle of construction satisfactorily accounts for the judgments pronounced in the two cases last cited. While the plea of greater distance from the church, when timeously stated by the owner of the ground to which it applied, was usually given effect to (*b*), it did not avail as a defence against the incumbent obtaining entry thereto as his glebe, when the ground had been for a considerable period recognised and possessed *qua* glebe under a formal decree of designation (*c*). It would appear that Church lands when enclosed where designable only in default of unenclosed Church lands of whatever class, and *ultimo loco*. Thus, in the case of Brechin (*d*), where it was, *inter alia*, pleaded in a suspension *quoad* an acre of ground that, being "environed with high dykes on all sides, and planted with trees round about," it could not be designed, the Court found this reason relevant, and admitted it to probation. In another instance (*e*) it was pleaded against a removing from lands designed as glebe

How Act 1572, c. 48, construed.

Enclosed Kirk lands.

(*a*) Halyburton *v.* Paterson, 1636, M. 5138.

(*b*) See Marshall *v.* Carnegie, 1605, M. 8495.

(*c*) Henderson *v.* L. of Legg, 1610, M. 5144; Clark *v.* Ramsay,

1621, M. *ibid.*. See also Cuninghame *v.* Kirkmaholm, 1594, M. 5135.

(*d*) Marshall *v.* Carnegie, 1605, *supra*.

(*e*) L. of Dunfermline *v.* M'Gill, 1629, M. 5137.

CHAP. X.

that there were four acres of designable ground nearer the manse. This plea, however, was repelled in respect, *inter alia*, that these lands, which were situated within the precinct of an abbey, although "commodious" for tillage, were "parked," *i.e.* enclosed.

Liability of
temporal
lands by 1644,
c. 31.

42. Without altering the order of liability to designation as then existing, the Act 1644, c. 31, enlarged the field of choice in the matter, by subjecting temporal lands, in default of Church lands, to be allocated for the minister's glebe. Treating this statute as embodied in or as re-enacted by that of 1663, c. 21, the elements for inquiry in the selection of ground for designation resolve themselves into these three viz.—(1) whether the portions of ground liable to designation as a glebe are Church lands or temporal lands; (2) if Church lands, the particular order to which they belong, as enumerated in the Act 1593, c. 165; and (3) the relative proximity of the several portions of ground to the parish church.

Existing order
of liability of
lands.

Order as
between
Church lands.

43. As in a question between designable arable Church lands themselves, equally, or nearly equally, adjacent to the church, the order of liability to allocation as the glebe will, as already explained, be regulated according to their former ownership by one or other of the different orders of the Romish churchmen (*a*). This element of distinction, however, between Church lands is often not now clearly traceable, and that of situation, or general convenience or advantage to the incumbent, would, in such circumstances, be regarded as of peculiar, perhaps superior, importance.

Element of
situation.

Failing
Church lands,
temporal lands
liable.

44. If there are no designable arable Church lands in the parish, or less than four acres of such lands, then the designation of the glebe must be made either entirely or

(*a*) See case of Kingsbarns, just cited, *passim*, where the designation of the glebe was out of priors' lands in the first place, bishops' lands in the second place, and college lands

in the third place. See this matter referred to in the House of Lords in *Ogston v. Stewart*, 1893, 21 R. 282; rev. 23 R. (H.L.) 16.

partially out of temporal lands. The principle of the rule which entirely exempts temporal lands from designation, when there is a sufficiency of designable Church lands, seems equally to regulate the case where there is a deficiency merely of such Church lands—to the effect of limiting the liability of designable arable temporal lands to designation to the extent of such deficiency. In the entire absence of designable arable Church lands, proximity to the church and manse will naturally form the primary and governing element in the selection of the temporal lands to be designed—no option of choice here existing as derived from the artificial classification of the lands arising from former ecclesiastical ownership (*a*). Besides proximity to the church, however, contiguity in the portions of ground to be designed is of high importance. Thus, in the case of Dunfermline (*b*), where the Presbytery selected four different portions of arable land for the glebe, all situated near the church, but some of them at a considerable distance from each other, the Court sustained an objection to the designation on this ground—remarking that in interpreting the statutory provision of vicinity to the church or manse the interest or conveniency of the minister was not solely to be regarded, and that it was unusual and unreasonable to designate a glebe out of so many detached pieces of ground.

Rule of
selection of
temporal
lands.

45. In the allocation of ground for a “grass glebe,” a similar principle applies, although a departure from it may be sanctioned when, as in the case of Barvas (*c*), a strict adherence thereto would, from the peculiar character or conformation of the ground, prove an inconvenient and disadvantageous arrangement. By the Act 1644, c. 31, temporal lands were liable to designation in default of Church lands,

Rule applies to
grass glebes.

(*a*) Thus, in *Campbell v. Morgan*, 1850, 12 D. 1262, Lord President Boyler remarks, p. 1265,—“When there are no Church lands in the parish, we must first look to the lands which lie nearest the manse.”

(*b*) *M'Lean v. Earl of Elgin*, 1813, Connell Par. 382.

(*c*) *M'Kenzie v. M'Crae*, 1825, 4 S. 146.

CHAP. X.

Lands
mortified to
schools, &c.

or "when the same were mortified to universities, schools, or "hospitals." This provision, if strictly applied, might have practically involved, in most cases, the entire exemption from designation of such mortified Church lands. Yet while it is generally assumed that the Act in question has been incorporated into or re-enacted by that of 1663, c. 21, full effect has not been given to the provision in question; and Church lands mortified to the pious uses mentioned have frequently been regarded very much in the same light as ordinary Church lands (a).

Hospital and
college lands.

46. Thus, in *Forret v. Matters* (b), the point appears to have been considered as doubtful whether Church lands belonging to an hospital should be designed before temporal lands; and although it was found, in the second case of Kingsbarns, that Church lands belonging to St. Andrews College were liable only after priors' and bishops' lands, still they were held liable *before*, and not, as the Act 1644, c. 31, provides, only *after* temporal lands.

2nd case of
Kingsbarns.

Liability of
pasture lands.

47. The liability of pasture lands to designation *qua* grass glebe emerges when there is an entire absence of designable arable lands within the parish, or a deficiency in the amount of four acres of such lands. None of the statutes specifies a different order of liability in the selection of pasture lands *qua* grass glebe from that which obtains in the selection of arable lands *qua* arable glebe. This being so, it may be assumed, in the absence of decision to a contrary effect, that similar rules of allocation generally apply.

SECTION X.—*What Lands are included within the class of Church Lands?*

Patrimony of
the Church
prior to 1560.

48. In its ordinary acceptation the term "Church lands"—styled in one case "umbboth" (c)—applies to and expresses

(a) See per Lord Ordinary Corehouse in *Magistrates of Montrose v. Scott*, 1832, 10 S. 212.

(b) 1678, M. 5139.

(c) *Dundas v. Nicolson*, 1778, M. 8511. See Session papers, 128 Arnistoun Coll. No 7, where this term occurs.

lands or heritable property generally, which constituted the patrimony of the Church prior to the Reformation (*a*). At that time the patrimony of the Church embraced lands, arable as well as pasture, rights of common, feu-duties, mills, fishings, &c., belonging to the inferior and dignified clergy; to abbeys, priories, and convents; to the several orders of monks and nuns; and to cathedral and collegiate churches (*b*).

49. While a right of property in ground, on the part of a Romish churchman or ecclesiastical body, was generally that which conferred on it the character of "Church lands," it did not exclude lands from being so regarded and dealt with, that at the Reformation the right of superiority in them alone remained with the Romish clergy. Thus in the case of Kingsbarns (*c*) the lands of Pitmillie, Fallside, and Newton of Randerston, which were so circumstanced, were held to be "Church lands," and so liable to be designed for a glebe. In the case of Auchtergovan (*d*) it was decided that lands which had been mortified—presumably by an ecclesiastical person or order—to the College of St. Andrews did not thereby cease to be Church lands.

50. In the case of Culter (*e*) it was pleaded that lands which had formerly belonged to a college or hospital were temporal lands, and on this ground not liable to designation; but the point was not disposed of. In the case of Montrose (*f*) it was found that lands which at the Reformation belonged to the Preaching Friars, or Dominicans, in that city, and were in 1570 or 1587 granted by James VI. to the magistrates and burgh for behoof of the town's hospital, were Church

(*a*) Per Lord Benholme in *Cochrane v. Smith*, 1859, 22 D. 260, foot.

(*b*) These and a variety of other subjects are embraced within the provisions of the Act 1587, c. 29, which, passed for the purpose of annexing the temporalities of benefices to the Crown, serves to indicate generally of what the patrimony of the Church then consisted.

(*c*) *Minister of Kingsbarns v. Hay*, 1799, M. *Glebe*, Appx. 2.

(*d*) *Cock v. Parishioners of Auchtergovan*, 1635, M. 5150.

(*e*) *Forret v. Matters*, 1678, M. 5139.

(*f*) *Magistrates of Montrose v. Scott*, 1832, 10 S. 211.

Though right of superiority merely, lands might be Kirk lands.

Hospital lands.

Dominicans' lands.

CHAP. X.

Temple lands.

lands, and as such liable to designation (*a*). The question whether lands formerly belonging to the Order of the Knights Templars, styled temple lands, were included in the category of Church lands was raised, but apparently not disposed of, in the case of Tweedmuir (*b*). The point again occurred in the case of Kilpatrick Easter (*c*), where it was ruled that temple lands were not Church lands. This doctrine is confirmed by subsequent decision (*d*), and applies to lands which pertained to the Knights of St. John (*e*).

St John's lands.

Mixed lands.

51. When ground which belonged, prior to the Reformation, to two proprietors in common, of whom one was a churchman and the other a layman, comes by progress to be vested in one heritor, that proportion of the lands which represents the churchman's share retains its ecclesiastical character, and is treated as Church land within the meaning of the Act 1663, c. 21 (*f*). In a suspension of a designation it was pleaded by the owner of the ground that it was not Church land, but had "ever been bruiked these many ages, "past all memory of man, as a special part of his barony." In reply the minister averred that the ground in question was Kirk land, "in so far as the Abbots of Cambus Kenneth "had raised yearly, these thirty years bypast, twenty shillings" as the annual duty thereof from the suspender and his predecessors. The Court held this alleged receipt of duty for the period, if proved, sufficient *per se* to imply that the ground was Church land. It was also found a relevant allegation by the minister to sustain a proof that the ground

Annual duty drawn by churchmen.

(*a*) From the terms of the Act 1587, c. 29—which specially exempts from annexation lands granted before its date to an hospital—it would appear that hospital lands, created such *prior* to 1587, were regarded by the framers of the statute as Church lands.

(*b*) Murray *v.* Trotter, 1649, 1 Br. Supp. 436.

(*c*) Duncan *v.* Parishioners of Kilpatrick Easter, 1698, M. 5140.

(*d*) Ross *v.* Vassals, 1700, M. 7985.

Lord Torphichen, 1748, 5 Br. Supp. 753.

(*e*) The lands formerly belonging to the Knights Templars were, on the extinction of this order in the beginning of the fourteenth century, along with their possession generally, transferred to the Knights of St. John of Jerusalem.

(*f*) Wilson *v.* Forbes' Trustees, 10th June 1818, F.C., as reversed 1822, 1 Shaw App. 249.

had been mortified to the abbacy, and the mortification confirmed by the Crown, without any averment that the alleged granter thereof was owner of the ground at the time; or that possession of the same by the abbacy was attributable to that title; or that the suspender's right in the subject flowed from the alleged granter or his author (*a*). While a presumption that particular lands are distinctively parsons' or vicars' lands arises from the circumstance (1) that possession thereof has been enjoyed by Protestant incumbents after the Reformation; or (2) that the lands are in immediate contiguity to what was of old the manse; or (3) that they form part of what were *de facto* old glebe lands—the presumption so raised may be overcome by circumstances tending to show that the lands formerly belonged to a higher order of the clergy, and are therefore Church lands of a different class (*b*).

CHAP. X.

Mortified
abbacy lands.Parsons' or
vicars' lands.

SECTION XI.—*Exemption of Lands from liability to Designation.*

52. The Act 1649, c. 45, excepted from liability to designation as glebe “villages and incorporate akers lying neerer the manse than the old gleibs which are not lyable to any designation of a gleib or any part thereof.” To a somewhat similar effect the succeeding Act, 1663, c. 21, specially declares that “in all designations of gleibs, incorporate acres in villages or town where the heritor hath houses and gardens, the same shall not be designed, he alwayes giving other lands nearest to the kirk.” The language here used is not very specific, and the exact import of the provision is still perhaps somewhat doubtful. That the incorporate acres referred to are such as are built on or are laid out as garden or cultivated ground, is perhaps the natural construction of

“Incorporate
acres” exempt.

(*a*) *Kerse v. Reid*, 1626, M. 5132.

(*b*) See *Nicolson v. Porteous*, 1622, M. 5136.

CHAP. X.

Meaning of the
term.

the sentence as a whole. It is not, however, very clear what the term "incorporate acres" itself means. It has frequently been maintained that it is not used in the Act in any very technical or precise sense, but that it is referable generally to portions of ground in or around a village or town which belong to and have been devoted by its inhabitants, or some of them, to one or other of the uses above indicated; in short, that the spirit of this enactment approximates toward the principle of the old law which tended to exclude from designation ground enclosed or built upon.

Case of
Peebles.

53. This view, however, of the statutory provision is hardly reconcileable with the decisions and judicial *dicta* which occur on the subject. In the case of Peebles (*a*), a reduction was brought of a decree of the Presbytery, designating as minister's grass a portion of ground which, on the eve of the Reformation, had been feued out in small lots to the inhabitants of the burgh. The pursuers maintained that although the ground in question, which was not included within the burgh's charter of erection and did not belong to an incorporation, and might not therefore, strictly speaking, be "incorporate," yet the phrase was not thus confined in its application, but was sufficiently comprehensive in its scope to include such lands as those in question. The Court, however, assailed from the reduction and sustained the designation. In the case of Jedburgh (*b*), one of the objections stated, but unsuccessfully, to a designation, was that some of the ground allocated formed a part of, or at least was contiguous to, the pleasure-ground of a heritor's country residence (*c*). In the case of Anstruther Wester (*d*) it was held that a field situated within the boundaries of a royal burgh and belonging in part to the kirk-session and in part to an

Cases of
Jedburgh,

Anstruther
Wester,

(*a*) Heritors of Peebles *v.* Dalgleish, 1784, M. 5163.

(*b*) Dundas *v.* Sommerville, 1805, M. *Glebe*, Appx. 5.

(*c*) So stated by Connell Par. p.

379; but this point does not appear from the report of the case.

(*d*) Bruce *v.* Carstairs, 1826, 4 S. 626.

incorporated friendly society in the parish, came within the category of "incorporate acres." Here one of the Judges (*a*) indicated the view that this phrase is not applicable to lands in or around a village or town, because they are the property of a corporation, but that to entitle them to this name they must themselves be incorporate. Another Judge (*b*), however, thought they might be regarded as "incorporate acres" because situated within a royal burgh. Possibly either circumstance realises the condition requisite and sufficient to satisfy the meaning of incorporate acres under the statute (*c*).

54. In the case of Lerwick (*d*) it was pleaded, in a suspension of a designation of ground as a glebe, that it formed part of the park or policy attached to the mansion-house of Leog. This ground was described in the report as a separate field surrounded with drystone dykes in bad repair. It contained a byre, but neither dwelling-houses nor garden. In these circumstances the plea stated against the liability of the ground to designation, in respect that it was a "planted and dyked enclosure," or "incorporated acres," was repelled by the Lord Ordinary (*e*), and in a reclaiming note the case was, without any decision on the point, remitted to the Presbytery.

Enclosed land
or incorporate
acres.

SECTION XII.—*Right of Relief among Heritors in respect of Lands designed.*

55. The Act 1594, c. 202, provides that when designations are made of manses or glebes out of Kirk lands, that the feuars, possessors, and tacksmen, out of whose lands the same are designed, shall have their relief of the remanent heritors of Kirk lands within the parish *pro rata*. The Act 1644, c. 31, on the other hand, referring to designations out

Acts 1594, c.
202, and 1644,
c. 31.

(*a*) Lord Balgray, 4 S. 667, foot.

(*b*) Lord President Hope, 4 S. 628.

(*c*) See Lord M'Laren's note in *Magistrates v. Presbytery of Arbroath*, 1884, 20 S.L.R. 781.

(*d*) *Campbell v. Morgan*, 1850, 12 D. 1262.

(*e*) Lord Dundrennan.

CHAP. X.

of temporal lands as well as Church lands, provides that the owner of the lands designed shall have relief from the whole heritors of the parish proportionally, viz. "heritors of Kirk lands when Kirk lands are designed; and the heritors of all lands of other holding when the designation is of other lands than Kirk lands."

Doctrine by
Stair.

56. Stair seems to intimate that when the glebe for the Protestant incumbent was designed furth of what had formerly been the glebe of the Romish parson, the owners of Church lands generally were not liable in relief, but that such liability was confined to those heritors who were feuars of portions of the old glebe (*a*). This view, however, does not appear to be correct. It is inconsistent with the terms

Not consistent
with decisions.

of the Act 1594, c. 202, and apparently with all the decisions on the subject pronounced since its date. Thus the report of an early case in 1616 bears it to have been "found by the Lords that the possessor of ane old gleib may crave relief" (*b*). To a similar effect is the case of Auchtergovan (*c*). Here a portion of land, formerly the Romish vicar's glebe, which was feued out in 1562 (but not confirmed till 1565), had been designed as glebe to the minister. The proprietor of the ground now pursued the other heritors of Church lands generally in the parish for relief. In defence they pleaded that as the Act 1563, c. 72, prohibits glebes to be feued, the lands must be regarded as still the vicar's glebe, and as such liable to be appropriated as glebe to the minister without relief. The Court, however, disregarded this plea, and found the defender liable as concluded for. Again, in the case of Peebles (*d*), where the minister's glebe was designed out of ground which was of old part of the vicar's glebe, it was decided that the owner's right of relief was not

Case of
Auchtergovan,

Peebles.

(*a*) Stair, ii. 3, 40.

(*b*) This case, which is reported by Lord Kerse—see *Law Repertorie MS.*, voce "Manse and Glebe"—is the one referred to in the foot-note to the above passage in Stair.

(*c*) *Cock v. Parishioners of Auchtergovan*, 1635, M. 5150.

(*d*) *Laidlaw v. Elliot*, 1800, M. *Glebe*, Appx. 3.

confined to the other feuars of the vicar's glebe, but extended to all the heritors of Church lands in the parish.

57. As between the owners of Kirk lands, therefore, their liability in relief is not subject to a similar order to that of the liability of the lands themselves to designation, but all proprietors of Kirk lands are liable in relief (*a*). The leading case, that of *Laidlaw*, was one with reference to minister's grass, but the judgment proceeded upon a construction of the old statutes with reference to glebes before minister's grass was introduced, and is therefore directly in point. The rule seems hardly consistent with principle. In a much older case, that of *Hassendean* (*b*), the point appears to have been canvassed, but the report is inconclusive.

CHAP. X.

Relief between heritors of Kirk lands.

Case of Hassendean.

58. Under the Act 1644, c. 31 (as revived by that of 1663, c. 21), relief is competent in all cases to the heritor out of whose ground the glebe has been designed. When such ground is Church land, then the heritors of Church lands are liable, and exclusively liable, in relief, the heritors of temporal lands being exempt from liability. Thus, in the case of *Montrose* (*c*), where the glebe was designed out of what were held to be Church lands, it was decided that no claim of relief lay against the defender, in respect that the lands belonging to him were temporal lands. On the other hand, when there are no Church lands and the glebe is designed out of temporal lands, then, in the language of *Stair* (*d*), "the whole heritors of temporal lands are to contribute for a recompense thereof proportionally."

Existing rule of relief among heritors.

Case of Montrose.

59. In its nature the right of relief in question is merely

Nature of the right of relief.

(*a*) *Laidlaw v. Eliot*, 1800, M. *Glebe* Appx. 3; *Cock v. Auchtergovan Parishioners*, 1635, M. 5150.

(*b*) *Duke of Buccleuch v. Scott*, 1670, 2 Br. Supp. 497. In this case it was maintained, on the construction of the Act 1594, c. 202, that it applied only where the whole or a great part of the parish consisted of Church lands; and that, as in this

particular instance there were not more than ten acres of such lands other than the lands of the heritor seeking relief, the heritor whose ground had been designed as glebe had no right of relief. The Court, however, repelled this defence.

(*c*) *Magistrates of Montrose v. Scott*, 1832, 10 S. 211.

(*d*) *Stair*, ii. 3, 40.

CHAP. X.

a personal claim of recompense against the other heritors, not a *debitum fundi* attaching to their properties (*a*). Hence it cannot be enforced against singular successors in these properties, but it is exigible only against the representatives of those heritors who were originally liable in the claim. The principle on which the liability of the heritors to supply the incumbent with a glebe rests seems to be that of a *pro rata* liability according to the valuations of their respective properties within the parish. If so, the relative rights of relief competent to the heritors whose lands are selected for designation will fall to be ascertained and determined on a similar footing.

Rule of assessment in relief.

Effect of absolute warrandice.

60. In *Elphinstone v. Blantyre* (*b*) it was held that a general clause of absolute warrandice in a disposition of Church lands conferred a claim of relief against the disponent in respect of a designation furth thereof for a glebe. A similar decision was pronounced in *Bonar v. Lyon* (*c*). But that in *Auchintuill v. Innes* (*d*) is to a different effect. Here it was found that a clause of absolute warrandice did not extend to a glebe designed out of Kirk lands after the vendition, unless specially expressed. And this is no doubt good law.

SECTION XIII.—*Minister's interest in the Designation of Ground for Glebe.*

Particulars in which it consists.

61. When a minister who is entitled to a glebe has not one provided for him, or when the glebe attached to the benefice is not of the legal size, he may, and naturally will, apply to the Presbytery of the bounds to design a glebe for him or make good the deficiency of the existing glebe. The mode of procedure to be adopted in such circumstances being elsewhere explained (*e*), it is only necessary here to advert to

(*a*) *Snow v. Hamilton*, 1675, M. 10,167.

(*b*) 1663, M. 16,585, *quoad* the four acres designed in 1642.

(*c*) 1683, M. 16,606 and M. 9099.

(*d*) 1676, M. 16,603.

(*e*) See *post*, CHAPTER XIV.

the minister's interest in connection with the designation. This is principally—(1) that the glebe to be designed be of the best description of ground which law authorises; (2) that it be of the full legal size or extent; and (3) that it be conveniently situated as regards the manse.

62. In the majority of instances arable ground is more valuable than pasture ground for the glebe; and as the law has made such ground, if it exist, liable in the first instance to designation for the glebe, it will in such cases be for the minister's interest to see that he is not deprived of the provision of four acres of arable land, and forced to accept souns of grass in lieu thereof, on the misrepresentation that a particular piece of ground is not arable, but pasture. While the minister is not at liberty capriciously to pick and choose in regard to the lands to be selected (*a*), he is quite justified in stating and urging on the Presbytery all legal and reasonable grounds of preference on his part in the matter of their selection.

63. Although the soil of the glebe be very poor, and its situation most inconvenient for the minister, yet, if it be of the full legal extent, he cannot, on either of these or similar grounds of inferiority of the quality of the provision, demand a new glebe, or an addition to an existing one (*b*). On the other hand, if the glebe be of less than the legal extent, the minister, though not entitled to claim a glebe *de novo*, is in the general case entitled to require that the deficiency in the glebe be made good (*c*). Both on the occasion of designating a new glebe, and on that of allocating ground to supplement a deficient glebe, the minister is entitled to see that he is provided with the full quantity, as well as the best quality of ground which law authorises. With a view to an authori-

Arable glebe
generally best.

Badness of
glebe no
ground for
another.

Otherwise if
deficient in
quantity.

(*a*) See *per curiam* in *Minister v. Heritors of Fraserburgh*, 1680, M. 5140; and *per Lord Ordinary Dundrennan in Campbell v. Morgan*, 1850, 12 D. 1264, foot.

(*b*) *Linning v. Baillie*, 1709, M. 5145.—See Fountainhall's Report.

(*c*) *Ibid.*

CHAP. X.

Meithing of
ground.

tative ascertainment of the former point, a surveyor or metster is usually appointed by the Presbytery. Approval by or acquiescence on the part of the minister in the result of the perambulation and meithing of the glebe, when done in a formal manner, will in ordinary circumstances exclude the minister, and even a succeeding incumbent, from disturbing the boundaries, or demanding an extension of the glebe. To this effect is the judgment in the case of Cadder (*a*), in reference to a glebe allocated under an excambion; and the principle seems equally to apply to a partial or entire designation of a glebe in the ordinary way.

Proximity to
manse.

64. Proximity to the church is made a statutory requisite in the selection of ground for the glebe, and as it is a matter of great personal importance to the minister that the glebe should be situated near the manse, so he has a proportionate interest in securing this qualification in the ground to be designated.

Grounds of
review of a
designation.

65. The Presbytery's deliverances are subject to judicial review on the general grounds either of alleged irregularity of procedure, error in judgment (*b*), or miscarriage of justice (*c*); and the minister may, in the ordinary case, appeal against them, in so far as they are alleged to be to his prejudice *qua* incumbent. The time at, the form in, and the tribunal to which the appeal is competent are explained elsewhere (*d*).

SECTION XIV.—*New Minister's right to enter into possession of the Glebe.*

Emerges on
his induction.

66. The minister's right to the glebe, where one exists, or his right to demand a glebe when a glebe does not exist, emerges on his induction to the cure, as opposed

(*a*) Lockerby v. Stirling, 1835, 13 S. 978.

(*b*) Campbell v. Morgan, 1850, 12 D. 1262.

(*c*) Potter v. Ure, 1710, M. 5129.

(*d*) See *post*, CHAPTER XIV.

to his election (*a*). The minister, on his induction, becomes entitled to the immediate use and occupancy of the glebe, save in the exceptional case after mentioned (*b*), when his otherwise absolute right of possession of the subject is temporarily suspended, or qualified to a certain effect.

67. Consequent on the minister's right to the use of the glebe immediately on his induction, is his right to acquire instant possession of it, and to take all steps necessary to attain such possession. Hence he is, as a general rule, entitled summarily, and without formal warning, to remove any one from the occupancy thereof, on reasonable notice given (*c*). This holds good, not only as regards the last incumbent (*d*)—when the vacancy in the cure has not arisen from his death, or as regards his widow or representatives when it has (*e*)—but also as regards an onerous assignee from the last minister, such as a tenant (*f*).

68. By some this right of summary removal on the part of the entrant minister has been attributed to a provision in the Act 1572, c. 48, authorising the Court of Session, on the application of such minister, to grant letters of charge against all possessors and occupants of their manses and glebes, whether the same be set in feu or tacks, or not, to remove therefrom within ten days. The right in question, however, is more commonly ascribed to the general principle that, on the termination of the

Right to
remove
occupants
summarily.

Foundation
of this right.

(*a*) *Ministers v. Heritors of Kirriemuir*, 1715, M. 9949; *M'Callum v. Grant*, 1826, 4 S. 527; *Lockerby v. Stirling*, 1835, 13 S. 978, and the fifth finding in *Lord Ordinary's interlocutor*, p. 982. Also per Lord Corehouse in *Earl of Kinnoull v. Presbytery of Auchterarder*, 1838, 16 S. at p. 769, the minister "can have no right to the fruits of the benefice until he shall be inducted."

(*b*) See *post*, p. 457.

(*c*) See per Lords Robertson and Glenlee, who, in *M'Callum v. Grant*, 1826, 4 S. at p. 529, remark, "But in regard to a manse and glebe . . .

"warning is not necessary, and the incumbent is entitled to possession summarily on his induction." Again, "a tenant of a glebe possesses *sine titulo* after the incumbent's death, and requires no regular warning, although undoubtedly he must have reasonable notice."

(*d*) *Couper v. Bruce*, 1692, M. 13,831; *Simpson v. Somers*, 1852, 14 D. 924.

(*e*) See finding applicable to *Quest. 3* in *Scrimgeour v. Executors of Murray*, 1664, M. 463.

(*f*) *M'Callum v. Grant*, 1826, 4 S. 527.

CHAP. X.

minister's incumbency, his title to the glebe is thereby extinguished, and that consequently he can neither himself, nor by another, maintain possession thereof adversely to the right of his successor when inducted into the cure.

Cases of Barry
and Leith.

69. Accordingly, in the case of Barry (*a*), the entrant minister was found entitled, on his induction, summarily to remove from the glebe the last incumbent, who had maintained possession in the face of a sentence of deposition by the General Assembly. Again, in the case of Leith (*b*), decree of summary removing from the glebe was pronounced against the tenant of the last incumbent, on the application of the newly inducted minister, although the glebe was not adjacent to the manse, was in use to be let by former incumbents, and was not intended to be occupied personally by the new minister. Although, in this instance, the tack by the minister contained an obligation on the tenant to remove without warning, the judgment of removal pronounced was rested not to any extent on this provision, but upon the abstract legal right on the part of an incumbent to possession of the glebe immediately on his induction to the cure. One of the Judges (*c*) seems to have attributed this right on the incumbent's part to the provision in the Act 1572, c. 48, already adverted to. The other two Judges (*d*), however, who concurred in the decision, appear to have relied on the general principle that the termination of an incumbency by death operated, as from its date, to extinguish all vestige of title on the part of the tenant to occupy the glebe as in a question with the succeeding incumbent (*e*).

(*a*) *Simpson v. Somers*, *supra*, 14 D. 924.

(*b*) *M'Callum v. Grant*, *supra*, 4 S. 527.

(*c*) Lord Glenlee, 4 S. 529.

(*d*) Lord Justice-Clerk Boyle and Lord Robertson, *ibid.*

(*e*) In the discussion of this suspension, the two early cases of Couper *v.*

Bruce, 1692, M. 13,831, already cited. and Hannay *v.* Rutherford, 1628, M. 14,989, were founded on. Of these cases, Lord Alloway, who dissented, remarked that neither of them was applicable, the former relating to a manse which did not fall under the Act 1555, c. 39, and the latter to a glebe newly designed.

70. While the entrant minister's right to the possession of the glebe may in the general case be made effectual immediately on his induction, this doctrine must be received subject to the qualification that when a crop has in the course of the ordinary administration of the subject been sown by the minister during his incumbency, which is un-reaped at its termination, the right of occupancy of the portion of the glebe so sown remains with the former minister or his representatives, as the case may be, to the extent necessary for enabling the crop to be reaped. This is an equitable consequence of the principle that the property in such crop belongs not to the new incumbent (a) *qua* possessor of the glebe, but to the person who laboured and sowed the ground, agreeable to the brocard *messis sementem sequitur*.

CHAP. X.

Occupancy of
glebe to reap
crop sown.

71. The doctrine in question seems to be of general application in the circumstances now mentioned. Possibly, however, it might not apply, or apply only in a modified degree, if in sowing the crop which he did the minister had thereby inverted the proper use of the glebe, or had sown it *in fraudem* of the succeeding incumbent's right to the profitable possession of the glebe. Subject to these qualifications, it rather appears that the right to the crop is not affected by the particular date at which it is sown, provided this be during the minister's incumbency. For, while the minister's survivance or death before certain terms modifies the right of his successor to stipend, it does not affect his right to the immediate possession of the glebe. At the same time, recognising the plain distinction which exists between an emerging right to occupy the glebe, and the right to the crop derived from its past cultivation, law awards to the former incumbent or his executors the fruit of his outlay and labour bestowed on the crop if sown during his incum-

Application of
the doctrine.Date of sowing
crop, how far
material.

(a) This doctrine is recognised in *Colvil v. Balmerino*, 1665, M. 464 and 466, where the Court, *inter alia*, found "that the glebe did not fall

"under the annat, nor did belong to
"the defunct, but only the crop thereof,
"if it were sown by himself."

CHAP. X.

bency. This condition, however, is essential, as the termination of his incumbency extinguishes all title on his part to the use of the glebe. If, therefore, after that date, either he or his executors sow a crop upon it, they do so without any legal right to reap it; and for any claim of recompense in connection therewith must look rather to the generosity of the succeeding incumbent than to the intervention of the law.

Right of
minister's
tenant to crop.

72. When, as frequently happens, the glebe is not in the personal occupancy of the minister, but is let by him to a tenant, questions of importance may, on the termination of the minister's incumbency, occur with regard—1st, to the ownership and disposal of the crop sown during but not reaped until after his incumbency is over; and 2nd, to the rent payable for the tenancy of the glebe. As the minister is entitled to let the glebe during his incumbency, the application of the principle explained in the preceding paragraph leads to the result (1) that the crop sown on the glebe during his incumbency by a person in his right, such as a tenant, belongs to the tenant; and (2) that if such crop cannot be reaped until after the induction of the next minister, his right of immediate possession of the glebe is qualified by such a right of occupancy on the tenant's part as is necessary for the ingathering of his crop.

Case of
Carnbee.

73. Both these points were substantially decided in the way now expressed in the unreported case of Carnbee (*a*). Here Brodie, while incumbent, let the ground designed to him for minister's grass to Carstairs by a missive of lease dated 1st November 1786, "during all the years of my "incumbency as minister of Carnbee," at the yearly rent of £3:10s., payable at Candlemas, after the separation of the crop. This lease commenced with a Martinmas entry, and

(*a*) *Anstruther v. Carstairs*, 1807. See Session papers, Hume's Coll. vol. xciv. No. 45, from which the state-

ment of the case in the text is compiled.

under it the glebe was possessed for many years by Carstairs, and on his death by his son. In the end of September 1804 Brodie was seized with a complaint believed at the time to be mortal, and of which he died on 27th October following. At the former date one-third of the ground had been summer fallowed and the remainder sown with beans. These were reaped in September (1804), and forthwith the tenant sowed the whole ground down with wheat, which operation was completed before Brodie's death. Shortly after that event the patron presented a Mr. Taylor to the cure, who was inducted prior to Michaelmas 1805, and before the said crop was reaped, which it was during Taylor's incumbency. The patron, conceiving that he had right to the wheat crop so sown before the commencement of the year in which it was to be reaped—whereof one-half was to be applied to pious uses, and the other half to be paid to Taylor—petitioned the Sheriff for warrant to sell the wheat, and for interdict against its being carried off by Carstairs, the tenant. The petition was refused by the Sheriff, and two bills of advocacy of this judgment by the Court. A third petition having been presented, Lord Robertson (4th February 1807) repelled the claim by the patron, in respect that the crop was reaped, not during a vacancy of the parish, but during the incumbency of Taylor, and further, repelled Taylor's claim, in respect that the tenant possessed the said portion of the glebe under a lease from the late minister to endure during his incumbency, and that the lands were laboured and sown before his death, and during the subsistence of the said lease. After hearing parties, the Court (18th June 1807) ^{Judgment pronounced.} refused the petition *as to the crop*, thereby deciding—1st, that the *tenant*, and not either the patron or the succeeding incumbent, was entitled to the crop; and, 2nd, that the tenant was entitled to remove the crop, and to this effect, consequently, to occupy the ground notwithstanding the incumbent's right of possession. From the subjoined notes

CHAP. X.

Ratio decidendi.

on the Session papers, it appears that the judgment pronounced was rested by the presiding Judge (*a*), not on the doctrine *messis sementem sequitur*, but on the footing that Carstairs was tenant of a *liferenter*, and so required a Whitsunday warning. This is not the *ratio decidendi* adopted in the case of Leith (*b*). Its soundness was there doubted (*c*); and indeed is scarcely reconcileable with the judgment there pronounced.

Rent due by minister's tenant.

74. When a tenant's lease of the glebe is unexpired at the termination of the incumbency of his landlord, the minister, the question naturally occurs to whom the rent due under the lease or otherwise is payable. This subject, upon which there is not very much direct authority, is, from the very peculiar nature of a minister's right in his glebe, not perhaps altogether free from difficulty. In the case of Wilton (*d*) the glebe lands were let to tenants under leases to endure during the minister's incumbency. The entry was at Martinmas, and the rent for each year's possession ending at this term was payable half-yearly at the two ordinary terms. The minister died in April 1851, prior to which date a crop had been sown by the tenants *on a portion* of the glebe, which was not reaped until the following autumn. At Whitsunday 1851, the deceased minister's widow, as his executrix, uplifted the half-year's rent of the *whole* glebe for

Rule adopted in case of Wilton.

(*a*) Lord President Campbell. The notes are as follow : — "18 June 1807, " Prest.—The tenant has right to the " crop, not because he had sowed, " but because he was tenant of a " liferenter, who could not be removed without a Whits. warning, " whether he sowed or not. Wd. " be the same with the tenant of " any other liferenter. What is " said in the Interlr. as to sowing " does not decide the question. But " as to the rent,—that does not " settle the matter. And as to that, " I think one-half goes to the patron, " tother half to the next incumbent : " Just as far would have right to

" the rent, though he could not " remove the tenant." Again Prest. — " The exccrs. of the minister make " no claim. In a question with the " tenant would make no difference " whether the tenant laboured in " end of autumn or in March or " April. The minister *could* let his " glebe and the tenant is protected " till warned.—Refuse."

(*b*) M'Callum *v.* Grant, 1826, 4 S. 527.

(*c*) See per Lord Glenlee, *ibid.* 529.

(*d*) Taylor *v.* Stewart, 1853, 2 Stuart, 538.

that year. On 27th September thereafter the new incumbent was inducted, who at Martinmas uplifted the other half of the rent for that year. In an action by the widow against him for payment to her of the whole rents of the glebe for the said year (1851), or at least those effeiring to the glebe lands sown that year prior to her husband's death, the Court found the widow, *qua* executrix, entitled to such portion of the rents, but to such portion thereof only, as were applicable to the glebe sown and reaped as aforesaid. *Quoad ultra*, the pursuer's title to demand on accounting for the rents uplifted by the entrant minister was repelled. The rule of allocation here adopted rests on the principle that the rent follows the crop, and that as the crop in question, had it been sown by the minister himself, would have belonged to his widow as executrix, so the rent due therefor by the tenant belonged to her. In this case, however, as will be observed, it was not determined what the amount of the rent applicable to the unsown glebe land was, to which the entrant minister was entitled, or how such rent, as effeiring to the period prior to his induction, was to be applied.

75. According to the principles applied in similar cases, as modified by the Apportionment Act (*a*), the executor of the minister who survived Whitsunday would be entitled to one half-year's rent, and if he survived Martinmas to the whole year's rent. In regard to the period between terms, the rent for the half-year current at the date of decease would be apportioned according to the period of survivance.

SECTION XV.—*Minister's Title to the Glebe.*

76. Ground which has been set apart as glebe, whether by former or constructive designation, is impressed with an allodial character (*b*). Consequently, infeftment is not

How constituted.

(*a*) 33 and 34 Vict. c. 35.

v. Duke of Buccleuch, 1869, 8 M'P. at p. 125.

(*b*) Ersk. Inst. ii. 3, 8. Per Lord Moncreiff in Presbytery of Selkirk

CHAP. X.

Case of
Corstorphine.

required to complete the minister's right thereto. The dedication of the ground as glebe, on the one hand, and the minister's induction on the other, constitute an effectual title to the subject, even against adverse possession fortified by infeftment. The case of Corstorphine (*a*) illustrates this latter point. Here, besides the glebe situated near the church, four acres of ground, two miles distant therefrom, had been allocated as minister's grass (*b*). This ground the Presbytery of the bounds afterwards feued out in 1748, and the right thereto was acquired by the defender under a disposition to his grandfather in 1790, on which infeftment passed and possession followed. In 1814 the pursuer, on his induction, refused to accept the feu-duty hitherto paid, and raised a reduction of the defender's titles, and a declarator to vindicate his right to the glebe as part of the benefice. The Court decerned to this effect, thereby recognising the incumbent's title to the lands *qua* glebe as preferable to that of the defender, though standing on possession since 1748, and infeftment in 1790, with continued possession thereunder for twenty-four years. In the case of Yarrow (*c*) the decree of designation was lost and the minister had had no possession for at least 150 years. But there was evidence that there had been a designation, and the heritor had annually paid a sum of money, gradually increased in amount, to the minister in respect of the glebe. The Court sustained the minister's right, the marches being still approximately traceable.

Glebes of
Romish
churchmen
allodial.

77. The lands which were possessed by the Romish churchmen as their glebes were deemed allodial (*d*), and they continued to retain this character after their appropriation for the use of the Reformed clergy. Indeed, it

(*a*) *Scot v. Ramsay*, 1827, 5 S. 367.

(*b*) Although here the provision was probably "minister's grass," rather than a "grass glebe," this does not affect the doctrine stated.

(*c*) *Presbytery of Selkirk v. Duke of Buccleuch*, 1869, 8 M.P. 121.

(*d*) *Stair*, ii. 3, 40.

would appear that such old glebe lands have sometimes been treated as allodial even after acquisition by a layman. A doctrine to this effect seems to be implied in the case cited (*a*), where the disposition of an old glebe by its then ecclesiastical owners to a layman in 1566, followed by forty years' possession, but without infeftment, was held sufficient to found a prescriptive title thereto in competition with the incumbent, who claimed the ground as his glebe, and ascribed such adverse possession to a title of tenancy. At the same time, a prescriptive title to ground which was at one time the parish glebe, may, adversely to the interests of the benefice, be acquired by a layman, under a disposition with infeftment, followed by forty years' possession, even although such disposition was in itself illegal, and as being so entitles the incumbent for the time to insist in the designation of a new glebe (*b*).

78. While, as above stated, infeftment in the glebe is not necessary to confer on the minister and his successors an effectual right to possess and use the ground constituting the glebe, and is not in point of fact usually given, instances are to be met with in which such symbolical delivery of the subject has been granted (*c*). Thus, in the case of Stonie Kirk (*d*), by virtue of a warrant to this effect by the Presbytery in 1649, a notarial instrument was expedited, bearing that a committee of that body gave the minister "possession, state and sasine, in the vicar's manse of Toscartin, and glebe thereof." Again, in the case of Cupar (*e*), it appears that after designation of the glebe the Moderator of the Presbytery, in their name and presence, gave infeftment therein to the minister

Prescription
adverse to
benefice.

Infeftment in
glebe
sometimes
given.

Stonie Kirk.

Cupar.

(*a*) *Liston v. Smythe*, 1816, Hume, 475.

(*b*) *Crawfurd v. Maxwell*, 1724, M. 10,819; *Minister of Falkland v. Johnston*, 1793, M. 5155. Per Lord Justice-Clerk Moncreiff in *Presbytery of Selkirk v. Duke of Buccleuch*, 1869, 8 M'P. at p. 128

(*c*) Such a ceremony is a nullity. Per Lord Moncreiff in case of *Presbytery of Selkirk v. Buccleuch*, *cit.*

(*d*) *Crawfurd v. Maxwell*, 1724, M. 10,819.

(*e*) *Adamson v. Paston*, 14th Feb. 1816, F.C. See Session papers, F.C. 1815-1816 No. 32, 2nd paper, p. 4.

CHAP. X.

for himself and his successors in office, by the usual symbols of earth and stone.

SECTION XVI.—*Lands how impressed with Status of the Glebe.*

By designation, actual or constructive.

79. Lands are, or are held to be, impressed with the status or character of the parish glebe by designation, actual or constructive. Actual designation is that overt act or process by which lands are or have been formally selected and constituted part of the temporality of the benefice, and as such dedicated to the use of the successive incumbents serving the cure. Constructive designation is of the nature of a presumption or inference deducible from the history and possession of the ground, and is assumed to exist in those cases where it has for a prescriptive or other long period been unequivocally regarded and dealt with as the parish glebe.

Designation by Presbyteries.

80. By the Act 1572, c. 48, the duty of designing glebes was committed to the bishops. Subsequently this duty was devolved on Presbyteries by the Act 1644, c. 31. Although this Act, as well as that of 1649, c. 45, was formally rescinded by the Act 1661, c. 15, and no such jurisdiction was specially granted to Presbyteries by any subsequent statute, including particularly that of 1663, c. 21, yet on the principle either that this last statute re-enacted and revived these two rescinded statutes (*a*), or that, as coming in place of the bishops, Presbyteries were entitled to exercise the powers formerly conferred on them (*b*), Presbyteries have all along continued to do so, and are still recognised as possessing undoubted original jurisdiction in the matter (*c*).

Designation, how proved or inferred.

81. Accordingly, the most direct and formal evidence of the designation of lands as a glebe is the decree pronounced

(*a*) See per Lords Robertson, Pitmilley, and Cringletie in *Magistrates of Ayr v. Auld*, 1825, 4 S. 99 (n.e. 101).

(*b*) See per Lord Justice-Clerk Boyle and Lord Glenlee, *ibid.* 100; Ersk. ii. 10, 56.

(*c*) See *post*, CHAPTER XIV.

by the Presbytery or an extract thereof. In the absence of the decree itself, facts and circumstances may be proved or adminicles of evidence adduced, which go to establish that the lands in question were, at or prior to a particular date, formally designed by the Presbytery in the usual way (*a*). On the other hand, it sometimes occurs that no evidence exists or can be adduced to prove the fact that lands were ever formally designed. They may never have been so, while yet their past history and possession unequivocally imply that they have for a long period been uniformly occupied or otherwise recognised as the glebe. In cases of this description, law assumes this continuous recognition of the lands as part of the benefice to amount in effect to proof of, or to be equivalent to, a designation. Accordingly, the remarks of one of the Judges in the case of Brechin (*b*), indicate that forty years' uninterrupted and unchallenged possession of lands as glebe, by the successive incumbents of the parish, would supersede the necessity of the production of a formal decree of designation. Such possession would in truth amount to evidence that the lands formed part of the benefice, their past history and possession not being reasonably consistent with any other hypothesis. In accordance with this principle, it was in one case (*c*) ruled that after the lapse of forty years a heritor could not challenge the state of possession of the glebe enjoyed during this period, on the allegation that such possession was *de facto* in excess of the true dimensions of the glebe, the Court treating such continued possession as conclusive evidence of the original extent of the glebe. On the other hand, the presumption arising in favour of the incumbent or the benefice from the state of possession of the subject would be weakened and might be entirely displaced by evidence tending to instruct,

Prescriptive
possession as
glebe.

(*a*) Presbytery of Selkirk *v.* Duke of Buccleuch, 1869, 8 M.P. 121.

(*c*) Williamson *v.* Mercer, 1789, 2 Hailes, 1062.

(*b*) See per Lord Deas in Panmure *v.* Halkett, 1860, 22 D. at p. 1392.

CHAP. X.

during the period of possession relied on, a use or state of occupancy of the subject fairly consistent with an existing right of secular ownership (*a*).

Extent of
Presbytery's
jurisdiction.

82. The power possessed by Presbyteries of designing glebes is statutory in its nature, and, as a general rule, is confined to providing a glebe for the use of the incumbents of a parish which has no glebe, or of making up the legal quantity of ground in cases where the existing glebe is deficient in size (*b*). The Presbytery is not entitled to design a new glebe to the incumbent in respect that the one which has been assigned to the cure is of a poor or barren soil (*c*), or even because it is obnoxious to the statutory disqualification of not being "ewest" to the manse, and might therefore have been successfully excluded from designation originally, if such objection had been timeously stated. Further, the Presbytery's power in the designation of glebes is limited to the appropriation of a certain quantity and description of ground as part of the temporality of the benefice, and does not, as the case of Ayr shows (*d*), include the right of awarding to the incumbent pecuniary compensation for the want of such provision, even although this be directly attributable to ill-founded opposition on the part of the heritors against the designation of the proposed glebe.

Cannot award
compensation.

(*a*) Thus, in *Crawfurd v. Maxwell*, 1724, M. 10,819, the ground had, from 1650 to the date of the action, a period of above seventy years, not been possessed by the incumbents of the parish, but by the heritors, the possession commencing with a tack for one year to the then proprietor of Ardwell, at a small money and meal rent. See also *Liston v. Smythe*, *supra*, Hume, 475, where the Court repudiated the doctrine of *tacit relocation*, there urged by the minister, as accounting for the possession by a layman of lands *qua* glebe for a period much beyond forty years. But *cf.* Presbytery of Selkirk

v. Duke of Buccleuch, 1869, 8 M'P, 121.

(*b*) *Linning v. Baillie*, 1709, M. 5145.

(*c*) *Ibid.* See Fountainhall's report.

(*d*) See *Auld v. Magistrates of Ayr*, 1826, 6 S. 1087. Although the point referred to in the text was here decided in connection with the want of a *manse*, this case supports a similar doctrine *quoad* the *glebe*, the law in regard to manses and glebes being substantially similar. See per Lord Robertson in *M'Callum v. Grant*, 1826, 4 S. 529, at top.

SECTION XVII.—*Excambion of the Glebe.*

CHAP. X.

83. While the general rule, as above referred to, is that when a glebe has once been designed the Presbytery's jurisdiction in the matter *quoad* the particular parish is at an end, an exception to this rule may perhaps be said to exist to the extent of recognising a right on the part of Presbyteries to effect or otherwise to sanction the excambion of glebes. Transactions of this kind seem to have been in certain circumstances warranted and indeed enjoined by the Act 1649, c. 45, which provides that when, from distance from the manse, the existing glebe could not be conveniently laboured, it should be changed, and a new glebe, equal in quantity and quality, designed in its stead, nearer to and not more than a quarter of a mile distant from the manse.

84. The occasion or motive for excambing glebes is not now regarded as thus limited. It is frequently suggested by reasons of general convenience not directly applicable to the benefice. Indeed the proceeding as a whole may even perhaps be regarded as deriving validity as much from the consent, actual or constructive, of all parties interested in it, whereby future challenge is excluded, as from any statutory power or authority in the matter vested in the Presbytery (*a*). At the same time it cannot be doubted that the excambion of glebes is recognised by the law (*b*), and indeed is favourably regarded by it, in those cases more especially where a permanent benefit or advantage has resulted therefrom to the benefice.

85. On the occasion of the transportation of the church

(*a*) On this point see paragraph 86 *et seq.*

(*b*) See cases cited in paragraphs 86 and 88, and *Stewart v. Glenlyon*, 1835, 13 S. 787, where the Court recognised the operative effect of an excambion of a glebe entered into about 1765 between the then Duke of Athole, on the one part, and the incumbent of the parish, with con-

sent of the Presbytery, on the other. See also *Dalhousie's Tutors v. Minister of Lochlee*, 1890, 17 R. 1060, 18 R. (H.L.) 72. The excambion of glebes is also recognised in 31 and 32 Vict. c. 96, sections 3 and 11, under which there may be an appeal from the Presbytery to the Sheriff in the matter.

Presbytery's
jurisdiction in
excambions.

Motive for
excambion.

Consent as
validating the
transaction.

CHAP. X.

Nature and
effect of the
transaction.

to a different part of the parish, under a decree of the Teind Court, it was frequently made part of the arrangement that the existing (manse and) glebe should be sold or otherwise disposed of, and another (manse and) glebe provided in proximity to the new church (*a*). Although such a proceeding practically involves an exchange of the old glebe for a new one, and was often completed by formal designation on the part of the Presbytery, it does not precisely realise the kind of transaction which is now generally known as an excambion of the glebe. By this phrase is ordinarily meant a voluntary exchange of the whole or of part of the ground of which the glebe consists for another portion of ground as a special independent transaction, irrespective of and unconnected with any other parochial alteration. The operation is theoretically a simultaneous act effected, or at least sanctioned, by the Presbytery, whereby the existing glebe ground is denuded of its ecclesiastical status and becomes secularised, and the other portion of ground constituted the glebe.

Presupposes
extrajudicial
consent.

86. While the sanction or warrant of the Presbytery may be necessary to divest the one portion of ground of its former legal status and confer such status upon the other portion, the transaction itself resolves into or presupposes an extrajudicial contract, and necessarily implies voluntary consent to the proposed arrangement on the part of the heritor whose ground is to be acquired as glebe as well as of the Presbytery. The body of heritors in the parish and the minister for the time are likewise interested in the proceeding, although in different degrees; and while the consent of the heritors is not essential to the validity of the excambion (*b*), its absence may permit of the proceedings being more readily objected to and set aside on other grounds.

Case of
Cranston.

87. The principle now indicated is illustrated by the case

(*a*) Examples to this effect occur in the cases of Orwell, 19th Jan. 1732; of Rothiemay, 13th Dec. 1752; and

of Belly, 21st June 1786, mentioned by Connell Par. pp. 227, 231, and 237.

(*b*) Bain v. Seafield, 1884, 12 R. 62, 1887, 14 R. 939.

of Cranston (*a*). Here the Court granted interdict at the instance of the heritors (of whom one was the patron) of the parish against the Presbytery carrying into effect an agreement for an excambion of the glebe entered into in 1824, between the then incumbent and the owner of the land to be acquired in exchange, and thereafter approved of by the Presbytery, and acceded to by another heritor whose lands would have been affected by the proposed transaction. Here the agreement and the proceedings following thereon had not been intimated and were alleged not to have been known to the suspenders, the remanent heritors of the parish, but the report of the case is unsatisfactory.

88. On the other hand, taciturnity for a considerable time—though not necessarily extending to the full period of forty years—tends to imply acquiescence in the arrangement, so as to bar an intending objector from setting it aside, and disturbing the state of possession which has followed thereon; and this even where the proceedings in the excambion have been irregular, and although the interests of the benefice may have been prejudiced by the transaction. A doctrine to this effect appears to have been recognised in the unreported case of Strichen (*b*), and also in that of Cadder (*c*). In the former case, the excambion was carried through in 1752 under an arrangement between the Presbytery and the owner of the ground, without intimation thereof to the heritors. The incumbent thereupon entered into the occupancy of the new glebe, and continued to possess it without objection till his death in 1784. In the following year the Presbytery's attention was called to the nature and effect of the transaction. After various proceedings before that and the superior Church Courts, the

Taciturnity or
acquiescence.

Case of
Strichen.

(*a*) Dalrymple *v.* Callander, 1827, 5 S. 935, and see Session papers in the case.

(*b*) Fraser *v.* Robertson, 1791. See Session papers, Campbell's Coll. vol.

lx. No. 112, whence the statement of the case in the text is compiled.

(*c*) Lockerby *v.* Stirling, 1835, 13 S. 978.

CHAP. X.

General Assembly obtained a report to the effect that the benefice had been dilapidated by the excambion; and under its orders an action, in name of the Procurator for the Church, was raised against the representative of the ground designed to have the transaction reduced, and matters reduced to their former condition. After various steps of procedure in this action, the Court appear to have pronounced a decree of absolvitor, mainly on the ground of presumed acquiescence in the excambion, from non-objection on the part of any one interested, during a period of above thirty years (*a*).

Case of
Cadder.

89. In the case of Cadder, *supra*, the Court assoilzied the heir of the owner of the ground given in exchange for the old glebe from an action brought against him in 1833 by the then incumbent, with the view of increasing the extent of the glebe possessed by him under an excambion effected in 1793, between his predecessor, with consent of the Presbytery, on the one hand, and the then owner of the ground on the other. Here the excambion remained unchallenged for nearly forty years.

Character of
benefice may
not be
changed.

90. While the Presbytery may, with the requisite consent, authorise an excambion of the glebe, neither this body by itself, nor with concurrence of the incumbent, is entitled to exchange the glebe, or any portion thereof, on

(*a*) On the information for the pursuer, the following notes occur, apparently in President Campbell's handwriting:—"Question about an excambion of a glebe. It seems to be admitted that the new glebe is inferior in point of size. But it may have been better in quality. The present question seems to be whether a proof should be allowed before answer. After so long an acquiescence, a strong presumption arises in favour of the transaction. Transaction cannot be undone in part—if reduced, must go back to his old glebe. Minister does not join." . . . *Justice-Clerk.*—

"Mortification, &c., partes ejusdem negotii. Too late to object points of form. Church in perpetual minority; and if considerable lesion proved, this might be relevant; but not at all probable. Persuaded that it was not unequal at time, but beneficial for the church. Probably now improved." *Eskgrove.*—"No condescendence necessary, for even if some inequality, too late to challenge it. If it be too late to make objections on points of form, we must presume every form to have been observed." *Dunsinman.*—"Too late."

terms which, although highly advantageous to the benefice in a monetary point of view, imply an alteration in the specific character of the benefice, as, for instance, a payment of money or other commodity in lieu of the possession of land *qua* glebe. The transaction in the case of Falkland (*a*), which was declared by the Court unlawful, was of this nature.

91. The ordinary and formal mode of proving an excambion of the glebe is by production of the deed itself, duly executed, which generally contains a short narrative of the transaction, and the signatures of the consenting parties, including the minister of the parish, the owner of the ground designed for the new glebe, and the Moderator of the Presbytery of the bounds (*b*). In one instance (*c*), although no deed of excambion was founded on, or apparently ever existed, the Court recognised an excambion, as effected under a verbal agreement to excamb, entered into between the incumbent and the owner of the ground, to which the Presbytery's consent was merely inferred from their subsequent conduct and actings.

Evidence of
the excambion.

Verbal
agreement.

SECTION XVIII.—*Effect of Designation quoad Extent of Glebe and Rights attached thereto.*

92. Assuming the ground allocated as glebe to have duly meithed at the sight of the Presbytery, the tendency of law is to recognise the decree of designation as equivalent to a bounding charter. This rule was stated in the case of Edrachilles (*d*). Here an extensive tract of land adjacent to the seashore was designed as a glebe, the boundaries

Equivalent to
bounding
charter.

(*a*) Minister of Falkland *v.* Johnstone, 1793, M. 5155.

(*b*) See, as an example, the deed of excambion in the case of Cranston, *supra*, Session papers, 1827, vol. cl. No. 643.

(*c*) See Bremner *v.* Officers of State, 1831, 9 S. 838; and there see per Lord Ordinary Corehouse, p. 839.

(*d*) Reay *v.* Falconer, 1781, M. 5151, and 2 Hailes, 890. The written arguments in this case, which are valuable, are contained in the Session papers, Arniston Coll. vol. exliii. No. 21. See also Dalhousie's Tutors *v.* Minister of Lochlee, 1890, 17 R. 1060, 18 R. (H.L.) 72.

CHAP. X.

of which appear to have been distinctly expressed in the decree of designation, but without mention of shore or any special clause of parts and pertinents. In an action by the heritor furth of whose lands the glebe was designed, the Court pronounced decree as concluded for, to the effect that the minister had no right to the sea ware *ex adverso* of the glebe, except for the purpose of manuring his land and feeding his cattle. In any view, however, the Presbytery could not have designed the foreshore as part or pertinent of the glebe.

Servitude
rights
unaffected.

93. At the same time a decree of designation has not the effect of extinguishing or limiting any rights of servitude which formerly belonged to the lands designed. Such rights remain unimpaired by the designation. Hence, where a servitude as of pasturage belongs to lands out of which a glebe is afterwards designed, a similar right, proportioned in its extent to that of the lands allocated as glebe, continues to attach thereto after designation in favour of the successive incumbents. Thus, in the case of Linton (*a*), the minister's right to the glebe was found to carry right to a proportion of common pasturage due to the Church lands out of which it was designed. Again, in *Hamilton v. Tweedie* (*b*), it was ruled that the minister was entitled to part of the privilege of pasturage effeiring to the feuars' lands whence his glebe was designed.

Case of
Linton.

Servitudes not
created by
designation.

94. On the other hand, it would appear that the provision quoted below from the Act 1593, c. 165 (*c*), and repeated in that of 1663, c. 21, is not intended to confer on Presbyteries power to constitute or create rights of servitude by designation, but merely to maintain in favour of the glebe the continued subsistence of such servitude rights as for-

(*a*) *Nairn v. Tweedie*, 1605, M. 5143 and 5146.

(*b*) 1630, M. 5146.

(*c*) Viz. that "glebes be designed
"with freedom of foggage, pastour-

"age, fewall, fail, diffat, loning, free
"ischue and entry, and all other
"priviledges and richtes, according
"to use and woont of auld."

merly attached to the lands which now compose it (*a*). This view, which is quite consistent with the terms of the statutory provision itself, is directly supported by the cases of Cairney (*b*) and Aberfoil (*c*). In the former instance the Court held as *funditus* null and void a decree of the Presbytery purporting to designate to the minister of the parish a servitude of casting peats in the moss of Drummuir in lieu of a like servitude enjoyed by the former incumbents in certain other mosses, but which right had come to an end through the exhaustion of the peat therein. In the latter case the Court found that a minister was not entitled under the clause in the Acts mentioned to a servitude of fuel, and could only claim it on the ground of former immemorial possession. The Presbytery cannot designate a right of salmon fishing to the minister (*d*). In one case, however, a right of salmon fishing, the origin of which was obscure, was sustained as belonging to the benefice (*e*).

95. If, after the minister's induction, it should become matter of controversy what the true boundaries of the glebe are, or whether a particular portion of ground forms part of it, or whether a certain right of servitude belongs to it; in short, when questions arise respecting the identity or extent of the glebe, or the rights appertaining thereto, these are points which cannot competently be tried or disposed of in a process of designation, or by the Presbytery, but must be adjudicated on by the Civil Courts in an appropriate action. Thus, in the case of Lochmaben (*f*), a petition was presented by the minister to the Presbytery craving them to vindicate, by designation or otherwise, his right to two acres of land

Salmon fishing.

Mode of asserting rights to glebe.

Case of Lochmaben.

(*a*) Per Lord Justice-Clerk Moncreiff in *Presbytery of Selkirk v. Duke of Buccleuch*, 1869, 8 M.P. at p. 126.

(*b*) *Duff v. Chalmers*, 1769, M. 5147, and 1 Hailes, 285.

(*c*) *Dymock v. Duke of Montrose*, 1779, M. 5149.

(*d*) Per Lord Watson in *Ogston v. Stewart*, 1893, 21 R. 282; rev. 23 R. (H.L.) 16, at p. 21.

(*e*) *Gilmour v. Sutherland*, 38 S.L.R. 561.

(*f*) *Marquis of Queensberry v. Gibson*, 1829, 7 S. 418; and see per Lord Justice-Clerk Boyle, p. 420.

CHAP. X.

which then were, and for a considerable period had been, in the possession of the pursuer, on the allegation that they truly formed part of the glebe. The Presbytery pronounced a deliverance in terms of the petition, and at the same time designated of new these two acres of land. On appeal, the Court suspended the proceedings as "fundamentally null," reserving to the minister right to bring an action of declarator.

Case of
Stornoway,

96. To a similar effect is the earlier case of Stornoway (*a*). Here an application was made to the Presbytery in 1821 by the then minister, setting forth that the boundaries of the glebe which had been designed in 1755 could not be traced, and therefore craving a designation of new. The Presbytery designed accordingly. Thereafter, under a petition to the judge ordinary, a warrant having been granted to put the minister in possession of the glebe, the owner of ground alleged to be encroached upon presented a suspension and interdict of this warrant, pleading, *inter alia*, that the Presbytery had in the circumstances no jurisdiction to designate a new glebe and that their proceedings were irregular. The Lord Ordinary refused, but the Court passed the bill. Again, the case of Cairney (*b*) shows that the Presbytery cannot designate a right of servitude to the minister as part of his benefice, and when he desires to vindicate such a right as appertaining to his glebe, the proper form of action seems to be a declarator before the Court of Session as in the case of Aberfoil (*c*).

Cairney.

Compensation
for want of a
glebe.

97. As has been already observed (*d*), Presbyteries cannot competently award to incumbents pecuniary compensation for the want of a glebe. When, therefore, the heritors decline or refuse to grant the minister such compensation, and he desires to insist in his claim therefor, he must do

(*a*) Mackenzie *v.* Fraser, 1822, 1 S. 394.

(*b*) Duff *v.* Chalmers, *supra*, M. 5145, and 1 Hailes, 285.

(*c*) Dymock *v.* Duke of Montrose, 1779, M. 5149.

(*d*) *Ante*, p. 466.

so before the civil courts (*a*). For this purpose he will, in ordinary circumstances, require to raise a special action. The course, however, authorised by the House of Lords in the case of Oldhamstocks (*b*), seems to indicate that in the process of review of the Presbytery's proceedings the Court of Session could competently entertain and, if well founded, give effect to such a claim by awarding compensation.

CHAP. X.

98. When the incumbent desires to vindicate his alleged right to the occupancy of ground as forming part of the glebe, or to invert the state of possession thereof in such a manner as may alter the extent of the benefice or affect the interests of succeeding incumbents, the Presbytery of the bounds, and likewise all the heritors of the parish, should be called as defenders. In the case of Cadder (*c*), where a summons was raised by the minister containing conclusions for making up an alleged deficiency in the glebe arising out of an excambion, the only heritor of the parish—there being other heritors in it—called as a defender along with the Presbytery was the owner of the lands whence the ground excambed was taken. The Court sustained the defence against this conclusion, holding that it could only be enforced against the heritors of the parish generally, and was incompetent against the defender as an individual.

Defenders in action affecting benefice.

Case of Cadder.

SECTION XIX.—*Nature of Incumbent's right of use of the Glebe.*

99. In assigning glebes to parish ministers the Legislature did not so much intend to supply incumbents with

Object in view in providing glebes.

(*a*) As in the case of making a judicial demand for manse maill, as to which see *ante*, p. 410.

(*b*) *Belshes v. Moore*, 1825, 4 S. 347; rev. 2 W. & S. 558. Here the minister had, from the unfounded opposition of certain of the heritors, been deprived for several years of the use of the glebe designed to him by the Presbytery. Their deliverance on the subject was sustained by the

Lord Ordinary, but recalled by the Court, whose judgment was in turn reversed on appeal, when the cause was remitted, with a declaration that the minister was entitled to compensation, that the Court was to fix the time from which the same was to be calculated, ascertain the amount due, and proceed as should be just.

(*c*) *Lockerby v. Stirling*, 1835, 13 S. 978.

CHAP. X.

a source of commercial profit, as with a subject whence they could supply themselves and their families with such of the necessities of life in kind as might be obtained by the prudent cultivation or use of a small portion of ground (*a*). The limited size of the glebe, the character of the lands, arable or pasture, whence the glebe is to be designated, and the usufructuary nature of the incumbent's interest in it, all point in this direction, and further justify the view that the produce of the subject, which it was truly intended should belong to the minister, was confined to the annual fruits derivable from its use as an agricultural medium of income, such as cereal, green, and grass crops.

Right to cut
down trees.

100. While, however, the incumbent's right to dispose for his own behoof of any part of the *corpus* of the glebe has not been recognised, he has certainly been found entitled to participate in the profits derivable from the subject to a greater extent than that now indicated. Thus, in the case of New Cumnock (*b*), the Court found that the minister was entitled to cut down and appropriate to his own use certain grown trees planted in the glebe by his immediate predecessor. The point was tried in the form of a suspension and interdict against the minister, and the report bears that the parties "waiving all specialties (as to the condition of the "trees), joined issue in the general question how far the "minister of a parish has right to dispose of trees on the "glebe *qua* proprietor." The Court, who were at first a good deal divided in opinion, ultimately remitted to the Sheriff with instructions to assolzie the minister and recal the interdict (*c*). If this case really decide in the affirmative the general question raised, it would seem to follow that

Case of New
Cumnock.

(*a*) See per Lord Balgray in *Stewart v. Glenlyon*, 1835, 13 S. at p. 798.

(*b*) *Logan v. Reid*, 1799, F.C., M. *Glebe*, Appx. 1.

(*c*) Referring probably to this case, Lord Alloway remarks, in *Bontine v. Carrick*, 1827, 5 S. 811, "It has been found that a minister cannot be

"prevented from cutting trees on "the glebe." As the trees in the case of New Cumnock were planted by the respondent's predecessor in the parish, their value may have been, and probably was, inconsiderable.

the incumbent is entitled not only to cut down timber on the glebe without consent of the heritors or Presbytery, but also to apply the proceeds thereof for his own personal use.

101. In the case of Madderty (*a*) the Court authorised the minister to work marl on the glebe, the proceeds thereof being applied for behoof of the benefice. Again, in the case of Lethendy (*b*), the minister was found entitled to dig peats from the glebe for the use of his family. This operation does, to some extent, involve a diminution of the soil. Yet, having regard to the qualified extent of the right here recognised, the actual encroachment on the *corpus* of the subject was inconsiderable.

Working marl.

Digging peats.

102. In the case of Newton (*c*) the Court found that the incumbent might work a valuable seam of coal below the glebe "at the sight and under the directions of the heritors and Presbytery," the proceeds being "under their control and management for behoof of the minister and his successors."

Working coal.

103. While this judgment does not to any extent imply that the incumbent may appropriate any part of the *solum* of the glebe to the prejudice of his successors, this case, as well as that of Lethendy, shows that the minister's beneficial interest in the glebe is not necessarily limited to its annual natural fruits. The case of Newton suggests the further remark, that the "glebe" includes not merely the superficies of a portion of ground, but all that lies beneath the surface, and that in whomsoever the right of ownership is

Import of the cases cited.

(*a*) Minister *v.* Heritors of Madderty, 1794, M. 5153, and Bell's Fol. Cases, 76. From the latter report it appears that the point raised by the minister was whether he was at liberty to work and sell the marl, he agreeing to employ the money derived from its sale for the use of the benefice. The pure question as to his right to the marl does not seem to have been decided or even raised. See also note appended to Logan *v.*

Reid, 1799, M. *Glebe*, Appx. 1, which seems to contain the interlocutor ultimately pronounced.

(*b*) Mercer *v.* Minister of Lethendy, 22nd Jan. 1789, not reported, but mentioned in Minister *v.* Heritors of Newton, 1807, M. *Glebe*, Appx. 6.

(*c*) Minister *v.* Heritors of Newton, just cited. See also Galbraith *v.* Minister of Bo'ness, 1893, 21 R. 30 (a case of land mortified as glebe).

CHAP. X.

vested the beneficial interest in the entire subject *a cælo ad centrum* belongs to and is apportionable among the incumbents as a class (*a*). The effect of this doctrine is in the case of glebes designated under the Act 1663, c. 21, to withdraw from the heritor whose ground is selected a very valuable proprietary right, and one which is much more extensive than is required to secure to the incumbent the beneficial use of the ground as an agricultural subject.

Cultivation of
arable glebe.

104. As the glebe consists of *arable* ground which, when designable ground of this character exists in the parish, is to be allocated in preference to pasture land as the minister's provision, the inference seems to be that the Legislature intended that the incumbent should possess and cultivate his "glebe" as an *arable* subject, and leave it impressed with this character and unimpaired in point of productiveness and value to his successor. No reported case seems to have occurred raising for judicial disposal the question how far a minister is legally bound to maintain his "glebe" in an arable condition during his incumbency by ploughing and cropping it, or what liability, if any, may attach to him or his representatives for his failure to do so at the instance of the succeeding incumbent, and under modern conditions of husbandry the question will probably never arise.

Use of "grass
glebe."

105. On the other hand, when the minister, on his induction, is put in possession of a "grass glebe," the nature of the provision imports that he may use and possess the subject as *pasture* land during his incumbency. This again implies that he is under no obligation to expend money or

(*a*) On this subject, in *Reay v. Falconer*, 1781, 2 Hailes, 890, Lord Monboddo says: "I have always understood that a minister's glebe was given for grass and corn, not that everything *de cælo ad centrum* was given. Would the minister have had right to a mine discovered within the limits of his glebe? Had he found in it a marble pit, or limestone quarry, he might

"have used it for the benefit of his glebe, but not for sale." Lord President Dundas remarks: "Mines do not belong to the minister, but only a right to the surface of the ground. The application of a different rule might be fatal. If by chance you should design a glebe to the dip of a coal, the consequences would be to prevent the coal from being wrought."

labour in reclaiming or cultivating the ground, so as to convert it from pasture into arable land. At the same time, he is probably quite entitled, in the general case, to do so, as such conversion seems in the view of the Legislature to imply increased productiveness and value in the subject. Such a conversion, more or less entire, of the subject has probably frequently occurred. It did so in the case of Carnbee (*a*), already mentioned, where this circumstance was founded on, although not much pressed in argument, both by the patron and the succeeding incumbent, as entitling them to the crop sown by the deceased minister's tenant on land which was allocated to the benefice for ministers' grass. The Court, do not appear to have specially repelled this plea, or indeed taken much notice of it; but the judgment pronounced implies that it was not considered well founded, as in a question with the tenant of the former minister.

Case of
Carnbee.

SECTION XX.—*Fewing and Leasing Glebes under the
Glebe Lands (Scotland) Act, 1866.*

29 and 30 Vict.
c. 71.

106. By the Act 1572, c. 48, it is declared unlawful for "ministers or readers, present or to cum, to sell, annalie, set "in few or takkes," or "to put ony in possession" of their "manses or acres of lands," in prejudice of their successors. Independently of this prohibition, the nature of the minister's right or interest in his glebe at common law is such as practically operates the same result (*b*), and, from want of power on his part, renders it incompetent for him to enjoy personally, or to confer on another, the use or occupancy of the glebe after his pastoral relationship with the cure ceases, except to the limited effect and for the special purpose of reaping the crop previously sown (*c*). Accordingly it is well established that at common law a minister's representatives are not entitled to remain in the occupancy of the glebe after

Prohibited by
Act 1572, c. 48.

Power at com-
mon law.

(*a*) *Anstruther v. Carstairs*, 1807,
not reported. See *ante*, p. 458.

(*b*) See *ante*, p. 455.

(*c*) See *ante*, p. 457.

CHAP. X.

his death (*a*); that he cannot retain possession of the glebe himself (*b*), or confer a right on his tenant (*c*) so to do, after the termination of his incumbency; and that he cannot, even with consent of the Presbytery, grant an alienation of any part of the subject, although on the most advantageous terms (*d*). Save in a few instances where special statutory powers were obtained (*e*), incumbents were precluded or disabled from granting to others any more enduring or extensive right of occupancy in their glebes than that now indicated, until the passing, in 1866, of the 29 and 30 Vict.

Powers conferred by 29 and 30 Vict. c. 71.

c. 71, above mentioned. By this statute the incumbent is empowered, with certain consents, to grant leases for eleven years, and feus or builders' leases of his glebe, and to sell rights of servitude therewith connected. The following summary may be given of the leading provisions of the Act (*f*).

Leases for 11 years, under s. 3.

107. With consent and approval of the Presbytery of the bounds, and of the heritors (*g*) of the parish, the minister may, at such rent and on such condition as they may approve, grant a lease for eleven years of the glebe (*h*)—five acres thereof nearest and most convenient to the manse being reserved for the minister's use. If the reserved five acres be included in the lease, then *quoad* them the lease is to terminate at the first term of Martinmas six months after the minister's incumbency ends. Grassums are prohibited, and rent due

(*a*) See *Scrimgeour v. Executors of Murray*, 1664, M. 463, *Quest.* 3; and per Lord Ordinary Curriehill in *Taylor v. Stewart*, 1853, 2 Stewart, at p. 540.

(*b*) *Simpson v. Somers*, 1852, 14 D. 924.

(*c*) *M'Callum v. Grant*, 1826, 4 S. 527.

(*d*) *Mackie v. Neill*, 1736, *Elchies, Glebe*, 2; *Minister v. Heritors of Little Dunkeld*, 1791, M. 5153; *Minister of Falkland v. Johnston*, 1793, M. 5155. Per Lord Ordinary Mackenzie in *Learmonth v. Paterson*, 1858, 20 D. at p. 420.

(*e*) Thus, in the case of St. Cuth-

berth's Parish, Edinburgh, and the East Church Parish, Dalkeith, statutory power was conferred by special Acts of Parliament to feu the glebe lands.

(*f*) The Act is printed in the Appendix.

(*g*) Under this Act the term "heritor" means the proprietor of land (*i.e.* agricultural lands),—*Russell*, 1898, 5 S.L.T. 334.

(*h*) The powers of a landlord as to consents to improvements under the *Agricultural Holdings (Scotland) Acts*, 1883 and 1900, can be exercised by the minister only with the consent of the Presbytery.

under the lease is payable to the minister. The consent of the Presbytery and heritors is to be signified by a certificate written on the lease, and signed by the Moderator and by the clerk of the Presbytery, and the clerk of the heritors.

108. With consent of the Presbytery and heritors, the minister may sell, for a fixed annual payment in grain or money, any servitude or right of pasturage over lands possessed by him *qua* minister. If the owner of the servient tenement elect to purchase the right absolutely, the purchase-money is to be invested, at the sight of the heritors and Presbytery, in such securities as the Teind Court shall direct, and the interest or proceeds of the same only shall be paid to the minister.

Sale of servitude rights under s. 4.

109. The minister is entitled, with the authority of the Teind Court, obtained under a petition presented with consent of the Presbytery and two-thirds of the heritors, to dispone his glebe, or part thereof (*a*), in feu, or to grant building leases thereof for ninety-nine years. Before presenting the petition, the minister intimates his intention to do so to the Presbytery by letter. The letter and petition are submitted to this body at its next meeting after their receipt, and if the Presbytery consider that the proposed transaction will benefit the benefice, they signify their consent thereto, subject to such conditions as they think fit, under a certificate to this effect engrossed on a copy of the petition, and signed by the Moderator and clerk (*b*). Thereupon the minister calls a meeting of the heritors in the usual way, and transmits a copy of his application to each heritor, or his agent, thirty days prior to the meeting, and if two-thirds in value of their number approve of the application, a certificate (*c*) to this effect is granted by the heritors' clerk to the minister.

Feuing glebe and building leases under s. 5.

(*a*) Where it is not proposed meantime to deal with the whole glebe, the petition should be so framed that it may be possible to resume proceedings by minute should further powers

afterwards be desired (Elliot, *Q. S. Parishes, &c.*, p. 46).

(*b*) See 29 and 30 Vict. c. 71, s. 6.

(*c*) *Ibid.* ss. 7, 8.

CHAP. X.

Petition to
Court.

110. Thereafter the minister presents the application to the Court, along with the certificates above mentioned, and the form of feu-right or lease proposed. The Court then order intimation and advertisement to be made of the petition, and service of it on all proprietors of lands conterminous with those proposed to be feued or leased (*a*), any of whom may appear and oppose the petition, on the ground of injury to the value or amenity of his property (*b*). Thereafter a remit is usually made to the Lord Ordinary on Teinds to inquire into the facts and report, and he in turn remits to a man of skill. On receiving the latter's report the Lord Ordinary reports to the Court both as regards the facts and as regards the form of deed to be adopted. After considering the reports under the remits made to inquire into the facts of the case, the Court, if satisfied, pronounce an interlocutor specifying the minimum feu-duty or rent, and authorising the minister, subject to such conditions as they may see fit, and at the sight of the heritors and Presbytery, to dispoise the glebe, or any part thereof, in feu for the highest feu-duty, or on building leases for the highest rent, in grain or money, that can be got, not being less than the minimum rates fixed, and that either by public roup or private bargain (*c*). The minimum rate of feu-duty varies greatly according to the circumstances of the case. In fixing it the building, not the agricultural, value of the land is to be regarded (*d*). It is not necessary in all cases that the feu should be one for building purposes (*e*). The value of the buildings to be erected, as fixed in the case of Penicuik (*f*) and other instances, was sixty years' purchase of the feu-duty, but, under the special circumstances stated in the case of Row (*g*),

Form of inter-
locutor.

Minimum feu-
duty.

(*a*) See 29 and 30 Vict. c. 71, s. 10.

(*b*) *Ibid.* s. 11.

(*c*) *Ibid.* ss. 12, 13.

(*d*) Campbell v. Morison, 1872, 11 M'P. 80.

(*e*) M'Leod, 1868, 8 M'P. 955.

(*f*) Imrie, 1868, 6 M'P. 284. The case is not reported on the point here mentioned, but the statement is made on the authority of the case next cited.

(*g*) Fogo, 1868, 6 M'P. 970.

the Court sanctioned a considerably lower rate of value. In the case of Wilton (*a*) the Court gave effect to a private arrangement between the minister and a conterminous proprietor for feuing part of the glebe to the latter (*b*) before the general authority to feu, under the prayer of the petition, had been granted. Where the heritors had built a new manse upon a part of the glebe, and the Presbytery had designed as glebe the site of the old manse and garden, the Court granted authority to the minister to feu the site of the old manse and garden, under reservation of the right of the heritors to the materials of the fabric of the old manse (*c*).

111. A model form of feu-charter has been adjusted by the Court (*d*), but variations are admitted to suit the circumstances of particular cases. In some cases the minerals are reserved, in others there is no reservation, according to situation of the ground in relation to mineral fields (*e*).

112. After an interlocutor granting authority to feu or let the glebe on building lease has been pronounced, any proprietor whose lands are conterminous with the glebe mentioned therein may, within thirty days from the date of the interlocutor, intimate his willingness to feu, lease, or purchase so much of the glebe, and at such rate as the Court may determine, and, if to feu or lease, he must undertake to grant such security over his estate, in addition to the glebe, as the Court may deem necessary (*f*).

113. The pre-emptor may be any conterminous proprietor. He, and not the minister, is the proper party to apply to the Court to exercise his right under section 17 (*g*).

(*a*) Minister of Wilton, 1868, 5 S.L.R. 631.

(*b*) As a "condition and restriction" under s. 13 of the Act.

(*c*) Gloag, 1873, 1 R. 187.

(*d*) See Minister of Scoonie, Petitioner, 1886, 23 S.L.R. 322.

(*e*) Imrie, 1867, 5 M'P. 1145; Brown, 1875, 2 R. 488.

(*f*) 29 and 30 Vict. c. 71, s. 17. The feudal effect of a decree of sale under this section is defined by section 36 of the Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94).

(*g*) Imrie, *supra*, 6 M'P. 284.

Right of pre-emption.

Application for its exercise.

CHAP. X.

This is done by way of a minute lodged in process containing an offer to purchase, &c. In one case it was held that the minute must not specify a maximum sum as the limit of the price offered, but must in this respect be unconditional (*a*). The minute, however, after it is lodged, may be withdrawn, provided no procedure has followed on it. On the other hand, the lodging of the minute does not conclude a contract binding against the minister, and it is in the power of the Court, at any time before decree of sale, to impose conditions for the protection of the amenity of the manse and any part of the glebe unsold (*b*). In the case of Rattray (*c*), where there were two offerers for the same portion of the glebe, the Court preferred the second offerer in point of time, he being the higher in point of value. Twenty-five years' purchase of the minimum feu-duty was in an unreported case (*d*) fixed as the appropriate price, but at that time, as stated by the Lord President, that was the current capital value of feu-duties. There is, however, no fixed rule, and the price is sometimes fixed without reference to years' purchase. The pre-emptor may be required to give adequate security over additional parts of his estate for the feu-duty. In the case of an entailed estate the security must be the whole estate, and the price paid or feu-duty must be such that the interest of the price at $4\frac{1}{2}$ per cent. or the feu-duty, as the case may be, does not amount to more than 3 per cent. of the rent of the estate.

To whom feu-duties, &c. payable.

114. The feu-duties and rents derived from feuing or leasing the glebe, and the interest of monies derived from the sale of any part thereof, and invested in terms of the Act, are payable to and recoverable by the minister and his successors in office. On the death of the minister, his widow, heirs, or executors are entitled to receive and dis-

(*a*) *Fogo v. Caldwell*, 1868, 7 M.P. 88.

(*b*) *Gloag v. Rutherford*, 1873, 11 M.P. 251.

(*c*) *Minister of Rattray*, 1868, 5 S.L.R. 659.

(*d*) *Campbell v. Morison*, 1872, 11 M.P. 80.

charge the said feu-duties and rents (*a*), in the same manner and for the same length of time as she or they are entitled to do *quoad* stipend in name of ann, under the Act 1672, c. 13 (*b*). In the event of a vacancy prolonged beyond this period, the heritors of the parish and the Presbytery may uplift the said feu-duties and rents, and apply them to the provision of the spiritual superintendence or the religious ordinances of the parish (*c*). The feu-duties and rents so payable to the minister are in lieu of the natural possession of the glebe, and exclude all demand against the heritors for providing a glebe or portion of land in place of that feued, leased, or sold; but they do not prejudice any claim which the incumbent may have to an additional glebe, irrespective of the provisions of the Act (*d*).

115. The expenses attendant on the petition, and the cost of making streets, roads, or drains in or through the glebe, are to be declared by the Court a permanent burden on the glebe, and the interest thereof, until extinguished, forms a first charge on the entire revenue of the glebe (*e*). While this burden remains unpaid, the casualties of superiority connected with the entry of heirs and singular successors to the glebe lands feued, and payments received from grantees in respect of the formation of roads, &c., are to be invested at the sight of the heritors and Presbytery, on such securities and in such way as the Court may approve, as a sinking fund to meet this burden, and the interest of this fund is payable to the minister. When the amount of this fund is equal to that of the burden, it is to be paid off, and

Expenses of application.

(*a*) The Act does not add *interest of monies*.

(*b*) As to this see *ante*, p. 303 *et seq.*

(*c*) 29 and 30 Vict. c. 71, s. 15.

(*d*) *Ibid.*, s. 16.

(*e*) *Ibid.*, s. 18. In this connection it was held that the cost of a new avenue to the manse, the construction of which had become desirable for its

amenity in consequence of the feuing of the glebe, could not be imposed as a permanent burden upon the glebe.—Robertson, 1896, 23 R. 526. The amount of expenses is usually ascertained by a remit to a man of skill. Any sums recoverable from feuars under the charter fall to be deducted.

CHAP. X.

thereafter the casualties of superiority are to be payable to the minister as part of his income (*a*).

Title to subjects feued, &c.

116. The various deeds requisite for conveying to or vesting in the lessee, feuar, or disponent right to the portion of the glebe leased, feued, or disposed, and his heirs or singular successors, are to be granted by the minister, with consent of the heritors, as certified by their clerk, and of the Presbytery, as certified by their moderator and clerk; and all deeds or writs so granted shall be as valid in favour of the grantees and their foresaids as if granted by a proprietor or superior, with a completed holding immediately under the Crown. The subjects so feued, leased, or conveyed are declared to be subject to the payment of poor rates. These deeds are to be recorded in the books of the heritors (*b*), and in each deed the full value of the feu-duties or rents shall be stipulated to be paid in perpetual annual feu-duties or rents during the subsistence of the right, payable half-yearly in grain or money, without any grassum. The casualties of superiority on the renewal of a title to heirs or singular successors are fixed at a duplicand of feu-duty (*c*). For enforcing payment of these feu-duties and casualties, the minister enjoys the same remedies as the superior in ordinary feu-holdings; and parties taking lands in feu under the Act, and their heirs and successors, enjoy all the rights and privileges competent to vassals, as if they held the subjects under the minister, as superior holding immediately of the Crown (*d*).

Casualties.

Rights and remedies of minister and feuars, &c.

SECTION XXI.—*United Parishes Act*, 1876.

39 and 40
Vict. c. 11.

117. It sometimes happens that where parishes have been united of old, it is found expedient to disunite them by erecting one of them into a new parish *quoad sacra*. When

(*a*) 29 and 30 Vict. c. 71, ss. 16, 19; Mackie 1874, 1 R. 934. Here the Court authorised the casualty, instead of being invested, to be applied at once in paying off in part

a bond for the expenses in connection with the application for authority.

(*b*) *Ibid.* s. 20.

(*c*) *Ibid.* s. 21.

(*d*) *Ibid.* s. 22.

under such circumstances there is in the united parish more than one glebe, it is reasonable that the glebe which originally belonged to the parish now disunited and re-created as a *quoad sacra* parish should be restored to it. Provision is made for this by the Act above cited, which authorises the Court of Teinds either in erecting a new parish, or, when this has already been done, to transfer such glebe to the *quoad sacra* parish, under reservation of the rights of present incumbents. In one case (*a*), where the small original parish of L. had been taken out of the united parish of H. E. and L., and, along with certain lands of much greater extent taken from the parish of A. and C., had been erected into the *quoad sacra* parish of B., the Court held that the Act did not apply to the circumstances, and refused to transfer the old glebe of L. to the new parish of B. In more recent cases (*b*) the Court have sanctioned the transfer although the new parish was made up to a certain extent of lands from other parishes in addition to the lands of the parish to which the glebe had originally belonged.

(*a*) *Minister of Brydekirk v. Heritors of Hoddam*, 1877, 4 R. 798.

(*b*) Southwick in 1901 is an instance.

CHAPTER XI.

ON MINISTER'S GRASS.

CHAP. XI.

Import of
1593, c. 165.

SECTION I.—*Origin and Nature of the Provision.*

1. The Act 1593, c. 165, declares that glebes should be designed "with freedom of foggage, pastourage, fewall, faill, " diffat, loning, frie ischue and entry, and all other priviledges " and richtes according to use and woont of auld." This provision, however, which is re-enacted by the statute 1663, c. 21, was construed as implying power on the part of Presbyteries not to constitute any such rights of servitude on behalf of the incumbent, but merely to maintain in favour of the glebe any of those servitudes which had formerly existed in connection with the land (*a*). Accordingly, neither that nor any previous statute authorised the designation of a given quantity of pasturage (*b*) as part of the benefice. This was done for the first time by the Act 1649, c. 45, which contains this clause—"And in like manner it is statute and ordained " that every minister have a horse and two kyes grasse, and " that by and attour his gleib."

Provision introduced by
1649 c. 45.

Whence designable under
that Act.

2. No exception to this rule, arising from the fact that there were no Church lands in the parish, was introduced by the statute last mentioned, the provisions of which assumed the law in this respect to be as it stood under the prior Act 1644, c. 31, which, *quoad* the glebe proper, enacted that when there were no Church lands in the parish it might be designed out of temporal lands. Thereafter the Act 1663, c. 21, was passed, which, *inter alia*, provides—

1663, c. 21.

(*a*) See *Duff v. Chalmers*, 1769, M. 5147, and 1 Hailes, 285; *Dymock v. Duke of Montrose*, 1779, M. 5149, and *ante*, p. 474.

(*b*) That is, a right of pasturage, as in contrast to a right of possession of pasture lands, *i.e.* a "grass glebe."

"That every minister (except such ministers of royal burghs who have not right to gleibs) have grass for one horse and two kine over and above their gleib, to be designed out of Kirk lands, and with relief according to the former Acts of Parliament standing in force; and if there be no Kirk lands lying near the minister's manse, out of which the grass for one horse and two kine may be designed, or otherways, if the saids Kirk lands be arable land, in either of these cases, ordains the heritors to pay to the minister and his successors yearly the sum of £20 Scots for the said grass for one horse and two kine, the heritors always being relieved according to the law standing, off other heritors of Kirk lands in the said paroch."

3. It has been already seen that while the statutes 1644, c. 31, and 1649, c. 45, were rescinded by the Act 1661, c. 15, the provisions which they contained applicable to manses and glebes were held to be re-enacted or revived by the Act 1663, c. 21 (*a*), which, *quoad* glebes as well as manses, was treated as if it had been passed on 14th March 1649 (*b*). Such a retrospective operation, however, was not extended to the statute *quoad* "minister's grass," it being held that although the Act 1649, c. 45, authorised "minister's grass" to be designed, its enactment on this subject was different from that in the Act 1663, c. 21, inasmuch as it did not impose on the heritors an alternative or subsidiary monetary liability in the event of there being no designable lands in the parish (*c*), but was exclusively confined to the allocation of pasturage out of lands which were designable. Accordingly, the provision of minister's grass is really attributable to the Act 1663, c. 21, alone (*d*). Retrospective effect of 1663, c. 21, not extended to minister's grass. Provision attributable to this Act alone.

4. The extent of the provision implied in minister's grass is sufficient grazing for two milk cows (*e*) and a horse (*f*). Extent of the provision.

(*a*) See *ante*, p. 423.

(*b*) The date of the Act 1649, c. 45.

(*c*) See *per curiam* in *Watson v. Law*, 1667, M. 16,588.

(*d*) This distinction between the two statutes is perhaps somewhat overlooked in one passage of the opinion of Lord Justice-Clerk Patton in *Macmillan v. Presbytery of Kintyre*, 1867, 6 M'P. at p. 39, para. 3.

(*e*) Per Lord Braxfield in *Grierson v. Ewart*, 1781, 2 Hailes, 888.

(*f*) "A horse, indeed, may be regarded as amongst the *essentialia* of the situation of a clergyman." Per Lord Meadowbank in *Carfrae v. Heritors of Dunbar*, 13th May 1814, F.C.

CHAP. XI.

The amount of ground to be allocated for this purpose will of course depend on the quality of the soil, and will vary accordingly. But the pasture awarded must afford ample nourishment, not bare subsistence merely, for these animals. In the cases of Oldhamstocks (*a*), and of Troqueer (*b*), $4\frac{1}{2}$ and 7 acres respectively were designed; in the case of Falkirk (*c*), where the ground selected was a moor, 20 acres were allocated.

Provision
additional to
glebe.

5. The provision in question, as both the Acts 1649, c. 45, and 1663, c. 21, distinctly declare, is "by and attour," *i.e.* over and above the glebe. Hence minister's grass is an allowance in addition to the glebe. This remark applies as well to the case of a glebe proper or of arable land (*d*) as to that of a grass glebe, for the statute makes no distinction in the matter, but treats the sixteen souns of grass as a mere equivalent for the four arable acres (*e*).

Effect of *extra*
size of glebe.

6. Even when the glebe, whether arable or pasture, exceeds the statutory extent, this does not necessarily exclude the incumbent's right to demand minister's grass (*f*). It seems to operate in this direction only in so far as such *extra* size of the glebe may be held to imply that minister's grass has been included in the designation of the glebe proper. Thus, in the case of Jedburgh (*g*), where the minister had a glebe designated prior to 1663, and extending to upwards of six acres of arable land, his claim to minister's grass, which the heritors opposed as in the circumstances unfounded, was sustained. Again, in the case of Kilconquhar (*h*), the

Case of
Jedburgh.

Kilconquhar.

(*a*) *Belshes v. Moore*, 1825, 4 S. 347, as rev. 2 W. & S. 558.

(*b*) *Grierson v. Ewart*, M. 5162, 2 Hailes, 799 and 888.

(*c*) *Wilson v. Forbes' Trustees*, 10th June 1818, F.C.; rev. 1 S. App. 249.

(*d*) See per Lord President Hope in *Stewart v. Glenlyon*, 1835, 13 S. 799, foot.

(*e*) Bank. ii. 8, 124.

(*f*) *Ibid.* ii. 8, 123; Ersk. ii. 10, 62; *Parishioners v. Minister of Banchory*, 1675, Dirleton, 124.

(*g*) *Dundas v. Somerville*, 1805, M. Glebe, Appx. 5.

(*h*) *Bethune v. Small*, 1811, Connell Par. 409. See also *Beaton v. Dallas*, 1734, Elchies, *Glebe*, 1, on which case Connell Par. p. 408, has the following note:—"The printed edition of Lord Elchies' decisions has no more, &c.; but, upon an inspection of the manuscript in the Advocates' Library, it was ascertained that the word 'no' was a superinduction of the press." Also *Parishioners v. Minister of Banchory*, *supra*, Dirleton, 124.

minister who had a glebe of eight acres was found entitled to minister's grass, the *extra* size of the glebe not involving the inference that minister's grass formed part of it. In *Pringle v. His Minister* (a) it was found that although the incumbent had been in use past memory to graze his cows and horse with a neighbouring tenant, this did not bar him from demanding a designation of minister's grass.

7. On the other hand, when from the *extra* size of the glebe, whether arable or pasture, and other circumstances, it is to be presumed that it includes as part of the designation grazing for a horse and two cows, a demand for minister's grass will be refused; or when from the union of parishes two or more glebes come to be enjoyed by the same incumbent the tendency will be to deal with the minister's claim for grass as already discharged. To the latter effect is the case of *Borgue* (b). Here, from the union of three parishes the minister was in possession of three glebes, which, although individually below the legal standard, amounted collectively to considerably more than four acres of arable land, besides sufficient grazing for a horse and two cows. No designation of minister's grass having ever been made in connection with the glebe of the old parish of *Borgue* a demand was now made to this effect, but was refused on the ground generally that, reckoning the several glebes together, the incumbent was possessed of the statutory amount of grass. In the case of *Dalgety* (c), where under an excambion of the old glebe of the parish, authorised by the Presbytery, they in 1770 designed a park or enclosure of $11\frac{1}{4}$ acres and $26\frac{1}{2}$ falls, "to

Presumption
from *extra* size
of glebe.

Case of *Borgue*.

Minister's grass
refused.

Case of
Dalgety.

(a) 1765, 5 Br. Supp. 903. See also *Wilkie v. Simpson*, not reported in Court of Session, House of Lords, 1770, 2 Paton, 222.

(b) *Forbes v. Miller*, 1755, M. 5127, See also *Minister of Kilmadock*, 1801, cited in *Dundas v. Sommerville*, *supra*.

(c) *Earl of Moray v. Nicol*, 1864, 3 M.P. 39. The theory, apparently, on which this judgment proceeds, is

that the transaction in 1770 was an excambion without any designation of a grass glebe which had not existed before. Either there had been a grass glebe before, which question was reserved in the judgment, or else the words about "a horse and two cows" were a mistake. Lord Deas held "it perfectly clear that there was not" a statutory designation of a "grass glebe" in 1770.

CHAP. XI.

" be the legal glebe to serve for grass to a horse and two cows and as the half acre customary for manse offices," &c., the Court held that this deliverance did not *per se* import a designation of minister's grass to the effect of excluding the minister from demanding such a provision.

SECTION II.—*Claim for Minister's Grass, to whom competent and how implemented.*

Provision
alternative.

8. The nature of the provision of minister's grass as constituted by the Act 1663, c. 21, is either a certain quantity of pasture *in forma specifica*, or an annual payment in lieu thereof. If there be Church lands in the parish not arable, then the minister is entitled to the provision in its specific form. The *onus* of proving the lands to be Church lands is on the minister (*a*). If there be no Church lands in the parish save such as are arable, then the minister can only claim the provision in its pecuniary form (*b*). Accordingly, it would constitute a good ground of suspension of a Presbytery's decree designating minister's grass that the lands selected are not Church lands (*c*); or that, being Church lands, they are arable (*d*), as this class of Church lands, equally with temporal lands, is exempt from liability to designation as minister's grass.

Are incorp-
orate acres ex-
empt?

9. By the Act 1663, c. 21, it is declared "that in all designations of *gleibs*, incorporate acres in village or town, where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk." It does not distinctly appear from the statute that this provision applies to minister's grass. Indeed, the context might seem rather to indicate that it does not, and that the exemption is confined to glebes proper and grass glebes. An opposite interpretation of the statute, however,

(*a*) See Minister of Panbride *v.* Maule, 24th Jan. 1815, F.C.

(*b*) Ersk. ii. 10, 62.

(*c*) Clephane *v.* M'Arthur, 1822, 1 S. 487.

(*d*) Macmillan *v.* Presbytery of Kintyre, 1867, 6 M.P. 36.

was assumed by the pursuers, and not repudiated, apparently, by the defenders in the case of Peebles (*a*); and such exemption is consistent with the judgment there pronounced.

10. Every minister who is entitled to demand a glebe proper is also entitled to demand minister's grass;—in kind, if there be designable Church lands in the parish—in money, if there be no such lands. The general doctrine now stated is supported by the case of Kirkcaldy (*b*), where it was held that the minister of a burghal-landward parish was entitled to the provision in question, either in the one form or the other. The ministers of the landward and landward-burghal parishes, as has been seen, are entitled to a glebe proper. If, as appears to be the case, the right to minister's grass presupposes a right to a glebe proper, then the ministers of purely burghal parishes have no claim to the former provision. On a similar principle, a like remark is applicable to the second ministers of collegiate charges, as such ministers are not entitled to demand a glebe proper.

What incumbents entitled to minister's grass.

Case of Kirkcaldy.

11. When Church lands, not being arable, exist in the parish, then the provision of minister's grass is designable out of them *in forma specifica*. In this case the owner or heritor of the lands selected is primarily liable in the provision, subject, however, to a proportional right of relief against the heritors of other Church lands, whether arable or not, in the parish (*c*). When no non-arable Church lands exist in the parish, then the provision of minister's grass is due only by way of the annual monetary allowance of £20 Scots. In this case the persons who are ultimately liable in the provision are the heritors of Church lands within the parish (*d*). Hence, the persons who are liable, either primarily or ultimately, in making good to the incumbent the provision

Designation in forma specifica.

Right of relief.

Allocation of money allowance.

(*a*) Heritors of Peebles *v.* Dalgleish, 1784, M. 5163. See also Belshes *v.* Moore, *supra*, 4 S. 347; rev. 2 W. & S. 558.

(*b*) Williamson *v.* Ramsay, 1685, M. 5121.

(*c*) *Supra*, pp. 436, 449.

(*d*) Durie *v.* Thomson, 1755, M. 5161; Fergusson *v.* Glasgow, 1745, M. 5157.

CHAP. XI.

Liability of
heritors *inter*
se.

of minister's grass, when such provision is demandable—whether in the shape of pasture ground or of an annual monetary allowance—are the owners or heritors of Church lands within the parish.

Meaning of
"Church
lands."

12. The meaning of the terms "Church lands," and "arable lands" has been already adverted to in connection with the subject of glebes proper or grass glebes (*a*). As the former expression is not affected by any specialty of application, the remarks already made upon it will suffice. The latter expression, however, as bearing upon the designation of minister's grass, demands distinctive notice.

SECTION III.—*Meaning of term "Arable" quoad designation of Minister's Grass.*

Meaning of
"arable lands"
in connection
with minister's
grass.

13. The various meanings attachable to the term "arable" as applied to land have been already enumerated (*b*), and the special meaning which it bears *quoad* the designation of a "grass glebe" has also been explained (*c*). This term, however, also occurs in the Act 1663, c. 21, in immediate connection with the designation of "minister's grass," and various cases have occurred illustrative of the meaning which law attaches to it in reference specially to this provision. While this meaning may be substantially similar to that assigned to the expression "arable" ground *quoad* liability to designation as a grass glebe, the starting-point of the inquiry as to the agricultural character of the ground is different in the two cases. A *grass glebe* is not a primary, but a subsidiary provision. The minister is only bound to accept it as a substitute for a glebe proper in the absence of designable *arable* land, of which a sufficiency is, *ab ante*, assumed to exist in the parish. On the other hand, minister's grass is the primary provision,—the annual monetary allowance being the subsidiary one, and only to be awarded in the

(*a*) See *ante*, pp. 431 and 444.

(*b*) See *ante*, p. 431.

(*c*) See *ante*, p. 433.

absence of designable *pasture* land in the parish, of which a sufficiency is *ab ante* assumed to exist. In the former case the presumption is that there are designable arable lands. In the latter case the presumption is that there are designable pasture lands.

14. Whether the distinction now indicated involves any reason for a difference in legal meaning between the term “arable,” as applied to land proposed to be designed respectively *qua* grass glebe and *qua* minister’s grass, is a matter on which judicial opinion is silent; but as the result of judicial decision and *dicta* on the subject, it would appear that, *quoad* the designation of ground for minister’s grass, the governing test of the character of the soil—*i.e.* whether arable or not—is rather to be determined by the actual mode of its present and recent cultivation or condition, than by its abstract capacity or even adaptability for tillage by the plough.

15. When its condition at this date is one of actual cultivation by the plough, this shows that the ground is not only capable of but has been subjected to cultivation, and has been regarded as a test that the ground is arable(*a*). The mere fact, however, that the land happened to be ploughed in the year of the designation has been regarded as insufficient *per se* to imply this character(*b*). It has even been held that land, although three times ploughed in the course of the preceding nineteen years, is not “arable,” when this was done not for procuring crops but for improving the pasture(*c*).

16. When, however, the actual condition of the land at the date in question coincides with that in which it has con-

State of, rather
than capacity
for cultivation.

State at date of
designation.

Antecedent
condition.

(*a*) Thus in *Grierson v. Ewart*, 1778, M. 5162, the Court expressed the opinion that the question whether lands fall within the exception of arable in the statute is to be determined by their condition at the time when the designation is applied for, however recently such lands may have been improved. See also *per*

Lord Balgray in *Bruce v. Carstairs*, 1826, 4 S. 626.

(*b*) See *per* Lord Justice-Clerk Miller in *Grierson v. Ewart*, *supra*, 2 Hailes, 801.

(*c*) *Belshes v. Moore*, 1825, 4 S. 347; rev. 2 W. & S. 558. See Session papers, 1825, vol. cxvii. No. 224.

CHAP. XI.

stantly or ordinarily existed for a long or considerable antecedent period, such condition is generally taken as a correct index or criterion of the true agricultural character of the ground. In particular, this test seems a conclusive one to the effect of fixing that the lands are arable in the case where at the date of the designation they are, and for a long immediately preceding period have been, under a course of cultivation by the plough (*a*).

Exceptional
present and
past use.

17. At the same time the actual condition of the ground, though similar to that in which it has existed for some time previously, may be attributable to exceptional causes and not to the true character or capabilities of the ground itself. Thus, land which from the richness of its soil is eminently adapted for producing root and grain crops, may from motives of taste, convenience, or profit on the part of its owner be laid down and kept in grass. In such a case, although the land may not *de facto* have been ploughed for a long period, yet, as it is manifestly adapted for cultivation, it rather comes within the legal category of arable land (*b*). When the existing state or condition of the ground is an exceptional rather than a usual one, then its usual condition will serve to suggest its character and will generally determine it (*c*). Accordingly, in the case of Kilcalmonell (*d*), where croft land which had been used as such for forty or fifty years, was turned into grass two years before the designation, the legal character of the ground was held to be arable.

Doctrine
illustrated.

18. The following *dicta* and decisions illustrate these re-

(*a*) Per Lord Benholme in *Macmillan v. Presbytery of Kintyre*, *supra*, 6 M.P. 41, reading the second and third paragraphs of his opinion together.

(*b*) "On the other hand, I should certainly hold lands to be arable if, from the rich nature of the soil, they are manifestly adapted for cultivation, although peculiar cir-

"cumstances have prevented them being cultivated." — Per Lord Benholm, *ibid.* See also *Anderson v. Thomas*, 22nd May 1810, F.C., as affirmed, 2 Dow, 433, *quoad* third plea stated for respondent, p. 436.

(*c*) See per Lord Justice-Clerk Patton in *Macmillan v. Presbytery of Kintyre*, *supra*.

(*d*) *Ibid.*

marks. In the case of Lochmaben (*a*) the Court observed that "the Presbytery must not pitch on *arable* land that "has been in use to be tilled," and that "heritors must not, in " *cemulationem*, till up what was in use to be lee." In *Stiel v. Dalrymple* (*b*) the Judges were of opinion, "that by arable " was not meant what was capable of culture, for there is no " land which is not capable of it, but that by arable was " meant land which is in use constantly to be laboured." In the case of Dunfermline (*c*) the Court thought that arable lands did not mean either lands that by industry could be laboured nor yet lands that were constantly in tillage, but " such grounds as of their own nature were arable, and now " or have been in use to be tilled in their course with the " other grounds of the farm, and lands not arable, such as " were not proper for tillage and have not been usually " employed in tillage." In the case of Kirknewton (*d*), the Court refused to suspend a decree of the Presbytery, designating as minister's grass outfield land (*e*) which had been in the constant use of being ploughed and of lying in grass alternately. This decision, however, is a doubtful one and the report is meagre.

19. In *Pringle v. His Minister* (*f*), the report bears that the Court found that the statute "which forbids arable ground " to be designed to a minister for his grass is to be understood " of *infield ground*" (*g*), but there is no narrative of the circumstances. This point was also so ruled in the earlier unreported case of Barry (*h*). The case of Peebles (*i*) indicates that although land be not well suited for pasturage, yet if it be not in its character "arable," it is designable as minister's grass at least in so far as any objection founded on

(*a*) *Steel v. His Parishioners*, 1712, M. 5131, 8498, 8502.

(*b*) 1748, M. 5161.

(*c*) *Minister of Dunfermline v. Black*, 1751, Elchies, *Glebe*, 5.

(*d*) *Hodges v. Bryce*, 1756, M. 5162.

(*e*) See *ante*, p. 431.

(*f*) 1765, 5 Br. Supp. 903.

(*g*) See *ante*, p. 431.

(*h*) *Minister of Barry*, mentioned, but without a date, in the report of the last case cited,—5 Br. Supp. 903.

(*i*) *Heritors of Peebles v. Dalgleish*, 1784, M. 5163.

CHAP. XI.

its general sterility is pleadable by the heritors. Here the Court sustained a designation of ground which, though not in tillage, was frequently covered with water and so very unsuitable for affording good pasturage.

"Arable,"
in a continued
state of cultivation.

20. In the case of Troqueer (*a*) it was ruled that the term "arable" meant ground "in a continued state of cultivation, though bearing crops of grass and not constantly under the plough." Here the land designed by the Presbytery as minister's grass appears to have been enclosed by a dyke and ditch twenty years prior to the designation, and to have been producing crops of grain or rye grass and clover. On the footing, accordingly, that the land was arable, the Court reduced the Presbytery's decree of designation. In the case of Jedburgh (*b*) the ground designed as minister's grass was situated within an enclosure and formed part of an arable farm. It did not appear, however, that this ground had ever been subjected to a course of cultivation, and it seems to have been admitted that, for a considerable number of years at least, it had not *de facto* been cultivated and was not cultivated at the time. In these circumstances the Court upheld the designation.

Ground may
be arable,
although better
adapted for
pasture.

21. In the case of Panbride (*c*), where the meaning of the term "arable" was carefully considered, the doctrine was expressed that ground must be deemed arable which had been in use to be tilled, although it might be better husbandry to turn it into grass. Here the land designated consisted partly of three plots of flat ground which had for many years been, and then were, in a state of cultivation according to the usual mode of agriculture of the district, but were rather better adapted for pasture, and were situated separately in the middle of other ground forming the rest of the designation, which was mostly steep and had never been cultivated. The

(*a*) Grierson *v.* Ewart, 1778, M. 5162, and 2 Hailes, 799, 888.

(*b*) Minister of Jedburgh, 2nd Feb. 1808, mentioned in a foot-note to next

case. See also Session papers, F.C., 1808-9, No. 91.

(*c*) Minister of Panbride *v.* Maule, 18th May 1809, F.C.

Court sustained a suspension of the Presbytery's decree of designation, thereby finding that the lands were "arable."

CHAP. XI.

22. In the case of Anstruther Wester (*a*) the Court held that lands which had been in grass for thirty years, but which were of rich soil and had prior to this period been regularly ploughed, and were kept in pasture for dairy purposes, were "arable" lands, and so not designable as minister's grass (*b*). The latest case on the subject is that of Kilcalmonell, already mentioned (*c*). Here the Presbytery designed as minister's grass land which, from the import of the proof led, was held by the Court to have been under a regular course of cultivation for about forty or fifty years prior to 1863, root crops as well as grain crops having been in use to be raised from it during this period. In 1863 the ground was laid down in grass, the proprietor intending to devote it thereafter to use as a lawn. The designation was in 1865, when in ordinary course it was not time for the land to be broken up. Skilled agriculturists deponed that the land was better suited for producing grass than grain crops. In these circumstances the Court held that the land was arable in the sense of law, and accordingly reduced the designation.

"Arable" although in grass, if really adapted for culture.

23. The date as at which the agricultural character of the land is to be fixed, with a view to determine its liability to allocation *qua* minister's grass, is the date of the designation. If the Church land is then held in point of law to be non-arable, it will fall to be treated and dealt with as such, although the heritor may, before the decree of designation becomes final, have by cultivation practically converted it into arable ground. This point, which was so decided in, is well illustrated by the case of Falkirk (*d*).

Date for fixing character of the ground.

(*a*) Bruce v. Carstairs, 1828, 4 S. 626.

(*b*) Here Lord Gillies remarked, 4 S. 628,—“I am satisfied that they “are not grass lands according to “the meaning of the statute. They “were cultivated as arable lands “originally, and then they were laid “down in grass, as being more advan-

“tageous.” See also to a like effect per Lord Hermand, p. 627, *sed contra*, per Lord Balgray.

(*c*) Macmillan v. Presbytery of Kintyre, 1867, 6 M.P. 36.

(*d*) Wilson v. Forbes' Trustees, 10th June 1818, F.C.; rev. on another point, 1 S. App. 249.

CHAP. XI.

Case of
Falkirk.

24. Here the Presbytery designated as non-arable Church land twenty acres of a moor. The heritor suspended this deliverance on the footing that the moor was not Church land. In the meantime he proceeded to plough the moor, and during the course of the litigation, which extended over several years, materially increased its productiveness. The Lord Ordinary found the minister entitled to the provision designable out of the lands as the same were at the date of the Presbytery's decree, reserving to the heritor his claim for meliorations against the minister. On a reclaiming note, the Court by a majority of one adhered, three of the Judges holding that the subject was rendered litigious by the proceedings before the Presbytery; that the improvements executed by the heritor were made *suo periculo*, and that, as his defence against the designation had failed, the minister's right to enter on possession of his grass lands must be given effect to as the same were at the date of the decree of designation.

SECTION IV.—*Order of Designation of Church Lands for Minister's Grass.*

Order of liability as in 1593, c. 165.

25. After a full argument on the point in the case of Whithorn (*a*), it was decided that the Act 1663, c. 21, has, in the designation of Church lands for minister's grass, adopted, or recognises as in force, the rule of liability prescribed by the Act 1593, c. 165, in the order of selection of Church lands for designation as a glebe proper or grass glebe. Accordingly, it was here ruled that friars' and bishops' lands could not be designed for minister's grass when there were parsons' or vicars' lands in the parish (*b*).

Condition of proximity to manse.

26. From the terms of the statute, it might also appear that the further condition of proximity to the manse on the

(*a*) *Nicholson v. Earl of Galloway*, 12th June 1823, F.C., and 2 S. 398.

(*b*) In the above reports of this

case, as in many other instances, "grass glebe" is used as meaning "minister's grass."

part of Church lands not being arable, is essential to subject them to liability to designation; and that when it does not exist, *i.e.* "if there be no Kirk lands lying near the minister's manse . . . or otherwayes, if the saids Kirk lands be arable," the provision of minister's grass *in forma specifica* fails, and can then only be awarded in the subsidiary form of an annual monetary allowance. This quality of situation, however, as will be observed, is in its nature relative and indeterminate, no specific standard of distance being mentioned; and it may perhaps be doubted whether it would operate to exclude from allocation lands otherwise designable, however distant from the manse, if these were the only designable lands in the parish. At all events the rule comes principally into play (*a*) in determining, as between two or more portions of designable lands, which portion is to be selected for designation. Possibly its operation may be still further limited to the case of Church lands of the same class, *i.e.* as in a competition of non-liability arising among the owners of different portions of ground, which of old belonged to the same order of churchmen, viz. vicars' and parsons' lands, bishops' lands, &c.

27. Whatever be the precise range of the rule in question, however, it is not so inflexibly applied as to exclude considerations of special convenience or general expediency. On the contrary, as the case of *Abdie* (*b*) shows, such countervailing reasons may be allowed to modify or invert the strict application of the rule. Here the Presbytery designated as minister's grass land which was further distant from the manse than other designable pasture land, but was more conveniently situated in their opinion than the latter for grazing purposes. On the ground, *inter alia*, that his lands were not *nearest* the manse, the proprietor brought a suspension of the

Rule as applied
flexible.

(*a*) It likewise seems to affect the question of *primary* liability for payment of the subsidiary provision of

the annual monetary allowance. See *post*, p. 508.

(*b*) *Anderson v. Thomas*, 22nd May 1810, F.C.; *affd.* 2 Dow, 433.

CHAP. XI.

Presbytery's deliverance, but the designation was sustained both by the Court of Session and on appeal by the House of Lords, in respect that a departure from the rule of proximity was justified by reasons of convenience.

SECTION V.—*When Heritors bound to provide Minister's Grass in kind?*

When there
are non-arable
Church lands.

28. Although there be Church lands in the parish, yet, if these be arable, the general rule is that the heritors are not bound to provide the incumbent with minister's grass *in forma specifica* (a). The case of Foulden (b) is peculiar. Here a heritor undertook to give the minister a right of grazing over the portion of a commony when allocated to him. The minister having thereafter been found entitled to grass, the Court held that it was designable out of this heritor's lands, although then all arable, and although there existed non-arable Church lands in the parish.

Case of
Foulden.

Former pay-
ment of money
does not bar
claim.

29. When there are non-arable Church lands fit for grazing in the parish of sufficient extent to afford ample pasturage for a horse and two cows, the general rule is that the incumbent is entitled to demand the provision of minister's grass *in forma specifica*. Accordingly an incumbent will not be excluded in these circumstances from demanding this provision in kind, even where, as in lieu of it, the annual monetary allowance of £20 Scots has, for a long course of years, been paid to the incumbent, unless this had been done under or by way of a formal settlement and discharge of his claim to the primary provision. On this principle it was found, in the case of Newburn (c), that the successor of an incumbent who had,

Cases of
Newburn,

(a) This is assumed in *Carfrae v. Heritors of Dunbar*, 13th May 1814, F.C., and is the plain meaning of the Act 1663, c. 21.

(b) *Wilkie v. Simpson*, not reported

in Court of Session, House of Lords, 1770, 2 Paton, 222.

(c) *Lawrie v. Halket*, 1804, M. Glebe, Appx. No. 4.

after the designation to him by the Presbytery of minister's grass, accepted the monetary allowance in lieu thereof, was entitled, even after the lapse of above eighty years, during which period the arrangement had been acted on, to demand and obtain a designation of minister's grass *in forma specifica*, furth of non-arable Church lands within the parish. To a similar effect are the cases of Panbride (a) and Abdie (b), where the immemorial annual payment of £20 Scots in lieu of minister's grass did not bar the incumbent for the time from claiming the primary provision. In none of these instances was the Presbytery's consent interposed to the substitution of the monetary provision, and the same had not in any other way been formally accepted as in lieu of the statutory provision in kind.

Panbride, and
Abdie.

30. A different result, however, follows when the subsidiary provision has been formally sanctioned by the Presbytery, and accepted of by the minister as in lieu of his claim to pasturage. In such a case the legal presumption is that such an arrangement was the legal alternative at the time, and when it has been acted on for the prescriptive period it will be difficult, if indeed possible, to challenge it. To this effect is the case of Dollar (c). Here the Presbytery, with consent of the minister and certain of the heritors, assigned to him £20 Scots annually in lieu of "grass," on the ground that the Kirk lands contiguous to the manse were arable. A succeeding incumbent, disregarding this arrangement, applied to the Presbytery for a designation of the statutory quantity of grass, which they granted. In a suspension at the instance of the heritor out of whose lands the designation was made, the Court gave effect to the former arrangement, sustaining the reasons of suspension on the

Otherwise
if money
payment sanc-
tioned by Pres-
bytery.

Case of Dollar.

(a) Minister of Panbride v. Maule, 18th May 1809, F.C.

(b) Anderson v. Thomas, 22nd May 1810, F.C.; affd. 2 Dow, 433. The

point for which this case is here cited is only mentioned in Dow.

(c) Minister of Dollar v. Duke of Argyle, 9th July 1807, F.C., and M. Glebe, Appx. No. 7.

CHAP. XI.

combined grounds—1st, that the Presbytery as the proper judicatory had put the minister in possession of that right to which, as in lieu of “grass,” he was at the time by law entitled; and 2nd, that this settlement of his claim having been acquiesced in beyond the years of prescription, must regulate the rights of the benefice for the future.

SECTION VI.—*When Heritors are bound in payment of Monetary Provision?*

When there are
no non-arable
Church lands.

31. When there are Church lands in the parish, but none which are not arable, the incumbent cannot claim the provision of minister's grass *in forma specifica*. In this state of matters his claim under the Act 1663, c. 21, resolves into a right to demand, and an obligation on the heritors to make payment of, the subsidiary provision of £20 Scots annually in lieu of pasture. From one of the findings in the case of Lochmaben (*a*) it might appear that, in the case where minister's grass is designable, the incumbent is entitled to choose between this provision and the monetary allowance in lieu of it, and select which he pleases.

Case of
Lochmaben.

Election does
not bind suc-
cessor.

Case of
Newburn.

32. Such choice, however, is personal, and does not bind successors. The judgment in the case of Newburn (*b*) is in accordance with this construction of the statute. Here the Court held that the existing incumbent was entitled to demand minister's grass *in forma specifica*—there being non-arable Church lands in the parish—although a predecessor in the cure had accepted the annual allowance in lieu thereof, which arrangement had been acted on for above eighty years. This decision negatives a right of voluntary

(*a*) *Steel v. His Parishioners*, 1712, M. 5131, 8498, and 8502. Here the Court find—“6to, It is in the minister's option either to take £20 for his grass, or to seek land to be allocated to him for that use.” See

also the fourth finding in the prior case of *Williamson v. Ramsay*, 1685, M. 5121, which is susceptible of an interpretation to a similar effect.

(*b*) *Lawrie v. Halket*, *supra*, M. Glebe, Appx. No. 4.

selection on the part of the incumbent which will bind his successors (*a*). CHAP. XI.

33. When there are no Church lands of any kind in the parish, the incumbent cannot, of course, obtain a designation of minister's grass in kind. It does not seem, however, to be settled by any direct decision whether in such a case he is entitled to demand the subsidiary provision of the annual money allowance (*b*). From the words of the statute (*c*) the inference is that the Legislature did not contemplate the alternative of the parish consisting entirely of temporal lands. The expressions used seem scarcely to reach such a case, and the terms of the clause of relief afterwards adverted to appear rather to imply that if there be no Church lands in the parish no claim of any kind exists in reference to the provision in question.

34. The sum of £20 Scots annually—equal to £1:13:4 sterling—which is fixed by the Act 1663, c. 21, as compensation for the want of grass for a horse and two cows, formed probably at the time an adequate recompense. It has, of course, long ceased to be so. Nevertheless, as was ruled in the case of Dunbar (*d*), the Court have no discretionary power to increase the allowance so as to make it a substantial equivalent.

(*a*) The judgment in the case of Panbride, *supra*, 18th May 1809, F.C., involves a similar principle.

(*b*) See Ersk. ii. 10, 62, and notes; and Connell Par. pp. 406, 421.

(*c*) Viz. "And if there be no Kirk lands lying near the minister's manse, out of which the grass for one horse and two kine may be designed, or otherways, if the saids Kirk lands be arable land, in either of these cases, ordains the heritors to pay to the minister and his successors yearly the sum of £20 Scots for the said grass for one horse and two kine, the heritors always being relieved according to the law standing off other

"heritors of Kirk lands in the said paroch."

(*d*) *Carfrae v. Heritors of Dunbar*, 13th May 1814, F.C. Lord Meadowbank dissented from the judgment, observing that as the Court might increase the cost of an original manse beyond the monetary limit of £1000 Scots, they had equal power and still more reason to extend the allowance of £20 Scots. Lord Robertson distinguished between these two things, resting the Court's right to enlarge the former sum on the principle that the statute declared that it was competent manses which were to be erected.

Quid juris
when no
Church lands
at all?

Allowance
cannot be
increased

CHAP. XI.

SECTION VII.—*Right of Relief competent to the Heritors.*

Provision in
1663, c. 21,
refers to that
in 1594, c. 202.

35. The statute which more immediately bears on the right of relief competent to the heritors *inter se* in regard to the provision of minister's grass, is that of 1663, c. 21, which contains this clause, viz.—“The heritors alwayes being “relieved according to the law standing off other heritors of “Kirk lands in the said paroch.” The law then “standing” was that contained in the Act 1594, c. 202, to the effect that where designation of manses and glebes was made furth of Church lands,—the whole or a great portion of the parish consisting of Church lands,—the feuars, possessors, and tacksmen, “out of quhais lands the manses or gleibes are “designed, sall have their reliefe of the remanent par- “ochiners, quha are fewars, possessours, and tackes-men of “Kirk landes, lyand within the said parochin, *pro rata*.” As minister's grass *in kind* is only designable out of Church lands, liability for rateable relief (at the instance of the heritor whose lands are taken) is commensurate with the ownership of lands of the kind subject to designation, *i.e.* Church lands.

Relief from all
owners of
Church lands.

36. Hence, when the provision in this form is awarded, the owners of the lands designed have a right of relief in respect of such designation, not only *inter se*, in proportion to the relative amount of land taken from them respectively, but also a right of relief as against the heritors of Church lands generally within the parish, whether arable or not. This right of relief is not limited to the proprietors of the particular class of Church lands furth of which the designation has been made, *ex gr.* vicars', or parsons', or bishops' lands, but embraces the owners of all Church lands within the parish. This point was after careful consideration so ruled by a majority of the Court in the case of Peebles (*a*);

Case of
Peebles.

(*a*) Laidlaw v. Eliot, 1800, *M. Glebe*, Appx. No. 3, and cases there cited.

and their judgment in this respect accords with that pronounced in the early case of *Kirkcaldy* (*a*), where a right of relief was specially reserved in favour of the owners of the ground designed "against the *rest* of the heritors of Kirk "lands within the parish." These decisions, as well as the terms of the Act 1663, c. 21, appear clearly to imply that, while the right of relief, where minister's grass is awarded in kind, extends against the heritors of all *Church* lands in the parish, it stops there, and does not embrace the heritors of temporal lands.

37. When, in lieu of minister's grass in kind, the subsidiary provision of £20 Scots annually is awarded, it might naturally be supposed that this sum would be at once apportioned among those heritors who, had their lands been arable, would have been ultimately liable in the burden of furnishing minister's grass in kind, *i.e.* the heritors of Church lands in the parish. The course, however, which seems to have been adopted is different.

38. In the case of *Kilwinning* (*b*), where all the Church lands near the manse were arable, the Presbytery awarded to the minister the annual allowance of £20 Scots, and decerned against the defender therefor, as the owner of the Church lands lying nearest the manse. As there were about 200 heritors of small portions of Church lands in the parish, which made it tedious and expensive for him to operate relief against them, he suspended this decree. In this process, after a great deal of discussion and considerable difference of opinion among the Judges on the subject, they found that "the £20 must be laid upon the *whole* heritors "of the parish," *i.e.*, whether of Church or temporal lands, and remitted to the Presbytery to proceed accordingly. This, however, was not intended to be a judgment to the effect that both classes of heritors were ultimately liable. On the

CHAP. XI.

*Kirkcaldy.*Mode of relief
for money
allowance.Case of
Kilwinning.

(*a*) *Williamson v. Ramsay*, 1685,
M. 5121.

(*b*) *Fergusson v. Glasgow*, 1545, M.
5157; and *Elchies, Glebe*, 3.

CHAP. XI.

contrary, "the Lords observed, that the heritors were obliged "to pay with relief off the heritors of Kirk lands." The interlocutor here pronounced was an unwarranted, or at least—as all the lands in the parish *de facto* were Church lands—an unnecessary one, and proceeds on a misconstruction of the clause of relief contained in the Act (a).

Case of
Dunfermline.

39. In the subsequent case of Dunfermline (b), the imposition of the burden, and the mode of its liquidation, were placed on a much more equitable footing. Here the heritors of the Church lands nearest the manse (and kirk) were made primarily liable to the minister in payment of the monetary allowance, with a right of proportional relief in their favour against the heritors of the other *Church* lands in the parish. In this way, the pecuniary burden was primarily imposed on those whose lands—had they been non-arable—would or might have been designed for pasture; and ultimate liability in the burden was confined to that class of the heritors from whose lands alone—had they been non-arable—minister's grass in kind could have been designed. The judgment now alluded to has not, it is understood, been contradicted by any subsequent decision. The right of relief mentioned in the statute does not extend against the heritors of *temporal* lands, even in the case where the subsidiary monetary allowance is awarded in lieu of minister's grass in kind.

Right of relief,
how given
effect to.

Does not
embrace heri-
tors of tem-
poral lands.

(a) Referring to the interpretation of the clause of relief under the Act 1663, c. 21, as implied in the Court's interlocutor in the case, Lord Kames says, M. 5160,—"This interpretation "of the statute cannot well be sup-
"ported; for the context plainly
"shows that the heritors who are to
"be liable at the first instance for
"the grass money are the same
"whose lands must be allocated if
"not arable. Beside that, it is pre-
"posterous to load the whole heritors
"at the first instance, and then to
"give them relief off the heritors

"of Kirk lands, when it would be
"easier, and more simple, to lay the
"burden directly on the heritors of
"Kirk lands. But the truth is, that
"it was a blunder in the statute to
"provide relief where money was to
"be paid in place of laying the
"grass money directly upon the whole
"heritors of Kirk lands, who, at any
"rate, are made liable ultimately.
"And it is probable that the Court
"will follow this plan by which the
"blunder will be corrected."

(b) *Durie v. Thomson*, 1755, M. 5161.

40. This right of relief is a personal claim of recompense against the heritors who are liable therein, and not a *debitum fundi* attaching to their properties (a). It is exigible against them in proportion to the valuation of their respective lands (b).

CHAP. XI.

Nature of right of relief.

41. Treating the Act 1663, c. 21, as not drawing back, *quoad* minister's grass, to the date of the Act 1649, c. 45, but as being, *quoad* this provision, a new enactment, it was decided in *Watson v. Law* (c), that a clause of absolute warrandice in a disposition of Church lands granted prior to 1663 did not confer on the disponent a right of relief against the disponent, in respect of a designation of minister's grass made out of the lands under the Act 1663, c. 21. Here the ground of judgment was that the designation had occurred under a supervenient law.

Clause of absolute warrandice.

Watson v. Law.

(a) See *ante*, p. 452.

(b) See the interlocutor in *Fergusson v. Glasgow*, *supra*, M. 5157, as quoted in Kames' Report, p. 5160.

(c) 1668, M. 16,588. See also

Elphinstone v. Blantyre, 1663, M. 16,585, *quoad* the three acres designed in 1649, which probably represent "minister's grass."

CHAPTER XII.

ON HERITORS AND THEIR MEETINGS.

CHAP. XII.

“Heritor”
used in various
senses.

SECTION I.—*General meaning of the term “Heritor.”*

1. The term “heritor” is used in various significations. These include, on the one hand, the meaning attachable to the expression at common law, and, on the other hand, certain distinctive meanings which are impressed upon it by force of special statutory provision.

“Heritor”
synonymous
with land-
holder.

2. In its original leading signification the word “heritor” appears to have been used in connection with that kind of ownership which implies a right, redeemable or irredeemable, in the *dominium utile* of heritable property, as opposed to (1) usufructuary right merely, and (2) a right of superiority. In this view of the phrase, which may be styled its common law signification, the term “heritor” is substantially synonymous with landholder. Thus, in alluding to the Act 1662, c. 6, for suppressing “theft, robberies, and depredations,” in which the words “heritors,” “wadsetters,” “feuars”—but not “liferenters”—occur, Mackenzie remarks (*a*) that “the words “wadsetters and feuars needed not to have been subjoined to “heritors, for both these are heritors. But it seems more “just to have added liferenters; since it was just that men “who are liferenters should be liable”—thereby indicating that, in the writer’s opinion, “liferenters” are *not* “heritors.” To a similar effect, Erskine (*b*), when referring to the Act 1663, c. 21, anent manses and glebes, uses the words, “land-“holders or heritors” as convertible expressions; and in the following section remarks, “that this term (heritors), used in

(*a*) Mack. Obs. p. 416.

(*b*) Ersk. Inst. ii. 10, 56.

“its most obvious meaning, excludes those who have life-rents.” Again, Bankton (*a*), when alluding to the above statute, says, “the expenses of building manse to ministers are declared by statute to fall on the *heritors* of the parish; and therefore *liferenters* are not liable to any proportion thereof.”

3. Consistently with the view just expressed, it was found in the case of Morham (*b*) that “the liferenter was free of any burden of the building of the manse” under the Act just mentioned. Alluding to this decision, Erskine (*c*) suggests that, as the reparation of the manse has less of the nature of perpetuity than has the building of it, the Court might possibly burden a liferenter with a proportion of the expense of such repair. This view was, however, rejected in the case of *Anstruther v. Anstruther* (*d*), where, in an action by the tutors of an heir of entail against his mother, who was liferentrix of certain locality lands forming part of the entailed estate, it was held that as such she was not liable for the cost of manse repairs, and that this burden fell exclusively on the heir of entail *qua* “heritor.”

Liferenter not heritor.

4. Although titulars have—at least when there are unexhausted or free teinds in the parish—a direct, and, it may be, a valuable usufructuary interest in the produce of other men’s lands, they have not *qua* titulars any right of property in the lands themselves. Hence titulars come not within the scope of the expression “heritors.” A decision to this precise effect was pronounced in the case of Ednam (*e*), and, in accordance with this doctrine, it was remarked by the presiding Judge in the case of Maryhill (*f*) that “the titular cannot be, in any event, subjected to the expense of upholding the fabric of the church.”

Titular not heritor.

(*a*) Bank. Inst. ii. 6, 30.

(*b*) Minister of Morham *v.* Binston, 1679, M. 8499.

(*c*) Ersk. Inst. ii. 10, 57.

(*d*) 1823, 2 S. 306.

(*e*) Relict of Minister of Ednam *v.* Laird of Wedderburn, 1663, M. 8499.

(*f*) Per Lord Justice-Clerk Hope in Reid *v.* Commissioners of Woods, 1850, 12 D. at p. 1214.

CHAP. XII.

Superior not
heritor.

Case of
Nesting.

5. Superiors are likewise excluded from the category of "heritors," because they do not, in their characters as such, own the ground. The particular character of the tenure of the lands does not affect the question. The owner of the property, however it be held by him, is truly the heritor as in contrast to the superior, although the latter also has an important feudal right in the subject. Accordingly, in the case of Nesting (*a*) the proprietors of udal lands, as well as the proprietors of lands held feu, were *qua* heritors found liable in manse assessment to the exclusion of the superior. Although superiors are not as such heritors, in certain parishes where assessments still fall to be levied according to the valued rent they may, by the presence of their names upon the cess-books, be liable as heritors. In some cases only a portion of the valued rent has been apportioned in the cess-roll upon the feuar, in other cases, where the whole of an estate has been feued out, the superior has neglected to have the valued rent in the cess-book allocated or apportioned among the feuars. In such circumstances the superior whose name remains upon the cess-roll is liable as a heritor for an assessment imposed according to the valued rent (*b*).

Tenant not
heritor.

6. As possessing merely the right of use or occupation of the subject, in contradistinction to a right of property in it, a tenant is not reckoned a heritor. Accordingly in the case of Neilston (*c*) it was "found not lawful to assess tenants for the expense of leading materials to be employed in building a manse, it being held that the burden of building the manse lay entirely on the heritors, which term does not include tenants." This remark is applicable not merely to tenants under short or ordinary leases, but also to those under leases which, from their long duration, partake of the character of constructive alienations, and where to a certain effect the

(*a*) Dundas v. Nicolson, 1778, M. 8511, 2 Hailes, 802.

(*b*) Trades House of Glasgow v. Heritors of Govan, 1887, 14 R. 910.

(*c*) Miller v. Craig, 1769, 1 Hailes, 329.

lessee is deemed in law the owner. Hence, it was ruled in *CHAP. XII.*
McLaren v. Clyde Trustees (a), that although tenants under leases for above twenty-one years were, in the sense of the Valuation Act, 17 and 18 Vict. c. 91, proprietors, they were not thereby constituted "heritors" to the effect of subjecting them in liability for church assessment, inasmuch as this statute merely regulates the mode in which assessments leviable under existing liability are to be imposed, and does not create new or more extended liability. Accordingly, in the case cited tenants under leases for ninety-nine years were held not to be "heritors," and consequently were exempted from liability for the parochial burden in question. In the Innerleithen case (b) where lands let upon a ninety-nine years' building lease at a rent of £80 were entered in the valuation roll at a rent of £1100, it was held by a majority of one in a court of seven, not only that the lessor was liable in the assessment for rebuilding the church, but also that he fell to be assessed upon a valuation of £1100 although he drew only £80. Even under a long lease.

8. It is not necessary, in order to impose the burdens and confer the privileges of heritor, that the person concerned should have a feudal title to property in the parish. It is enough that he should have a beneficial interest in land such as the ownership of an aqueduct (c). Beneficial interest not feudal title regarded.

9. Incorporate bodies such as canal or railway companies possessing works, buildings, or ground within the parish, being landholders, are held to be and are dealt with as "heritors." Incorporate companies "heritors."
 To this effect is the case of *Anderson v. Union Canal Company* (d), on the construction of the Poor Law Act, 1663, c. 16. A similar principle is recognised in the cases of *Slamannan* (e) and *Coupar-Angus* (f) for payment of manse

(a) 1865, 4 M.P. 58; affd. 6 M.P. (H.L.) 81.

(b) *Traquair's Trustees v. Heritors of Innerleithen*, 1870, 9 M.P. 234.

(c) *Hay v. Edinburgh Water Company*, 1850, 12 D. 1240; affd. 1 Macq. 682. *McEwan v. Corpora-*

tion of Glasgow, 1899, 1 F. 523; affd. 2 F. (H.L.) 25.

(d) 1839, 1 D. 648.

(e) *Macfarlane v. Monklands Railway Company*, 1864, 2 M.P. 519.

(f) *Scottish N. E. Railway Company v. Gardner*, *ibid.* 537.

assessment and poor rates, where, but for the clause of exemption from parochial and other burdens in their Acts of Incorporation, the defenders—railway companies—would have been found liable therein *qua* heritors.

SECTION II.—*Application of the term "Heritor" in Burghal and Burghal-Landward Parishes.*

Burghal community
"heritors."

10. When the parish contains a burgh, the burghal incorporation, as represented by the magistrates on behalf of the community, may be regarded either as a body of heritors or as one heritor. In the case of Elgin (*a*), where a suspension was brought of a charge for manse assessment, one of the Judges remarked that it was a competent and indeed the more correct course to cite the magistrates of a royal burgh under the designation of "heritors," rather than under that of magistrates. In the Stranraer case (*b*) it was judicially remarked, "There is no doubt that the incorporation of the burgh in this case constitute the heritors." Again, in the Lanark case (*c*), the presiding Judge observed, "Magistrates are therefore to be held heritors for the burgh property in terms of the Act 1663." Further, in the allocation of the area of a burghal-landward parish church the magistrates of the burgh were generally regarded as one heritor, to whom the portion of the church effeiring to the burghal community was assigned for sub-allocation by them of the sittings therein to the inhabitants, as in the cases of Campbelton (*d*), which was cited from the Bench in *Clapperton v. Magistrates of Edinburgh* (*e*), as recognising the principle now alluded to, and of Kinghorn (*f*).

(*a*) Per Lord Mackenzie in *Magistrates of Elgin v. Gatherer*, 1841, 4 D. at p. 32.

(*b*) *M'Neel v. Robertson*, 1836, 14 S. 849, per Lord Ordinary Moncreiff, at p. 851.

(*c*) *Lockhart v. Lockhart*, 1832, 10 S. 243, per Lord Justice-Clerk Boyle, at p. 247.

(*d*) *Duke of Argyle v. Rowat*, 1775, M. 7921.

(*e*) 1840, 2 D. 1385, per Lord Fullerton, at p. 1417.

(*f*) *Sinclair v. Magistrates of Kinghorn*, 1761, M. 7918. *Cf.* *Heritors v. Magistrates of Kinghorn*, 1897, 24 R. 704.

11. In connection with this subject reference may be made to sections 85 and 86 of Chapter V. and the cases there cited, and also to pp. 542-4, *infra*. There can be no doubt that so long as it was the universal or the general practice to levy assessments upon the valued rent, the burgh, both for purposes of control and privilege, and also for purposes of the primary allocation of assessment, was treated as one heritor. In the Annan case (*a*), *The Lord Justice-Clerk* (whilst reserving his opinion as to the rights of magistrates in the present state of the law), indicates an opinion that the practice arose from the fact that there was no valuation of the separate properties within burgh corresponding to or commensurate with the valued rent, and that therefore it was necessary to treat the burgh as a *unum quid*, leaving it to the magistrates to stent the town feuars for the town's share. It is very doubtful, however, whether this is a completely satisfactory explanation of the recognition accorded to magistrates in connection with churches and other ecclesiastical matters in a landward-burghal parish. There can be little doubt that two centuries ago the idea that a town feuar was the peer of a landward heritor, and was prevented from acting, voting, and claiming privileges along with him only by an accidental inconvenience in regard to valuation and assessment, would not readily have been entertained. On the contrary, the theory was that the whole town as represented by the magistrates was the equivalent of one landward heritor, and the magistrates in that capacity, like any other heritor, got a gallery seat for themselves, and a share of the other seats in trust for those whom they represented. It has now been authoritatively determined by the Annan case (*a*) that in the case of real rent assessments all owners of property, whether without or within the burgh, are parochial heritors on an equal footing, and in these circumstances it is difficult to find any room for

History of the law.

(*a*) *Downie v. M'Lean*, 1883, 11 R. 47.

CHAP. XII.

the magistrates in regard to either duties or privileges as heritors (*a*).

Burghal
parishes.

12. It has been stated that in a purely burghal parish the magistrates are the heritors (*b*) but the bearing and effect of this proposition are obscure. The individual owners of lands and heritages in a purely urban and burghal parish, where the church was founded and is maintained by the magistrates, appear to have no duties or liabilities as heritors. There may, however, be a parish which is burghal in so far as it lies wholly within the ancient burgh, but where, nevertheless, as there is or formerly was a rural area, the stipend is paid out of [the teinds, and the parochial organisation is similar to that of a landward or landward-burghal parish. Arbroath (*c*) appears to be an example of a parish of this kind.

SECTION III.—*Special meaning of the term "Heritor."*

Under 1663,
c. 16, heritors
include life-
renters.

13. While the term "heritor," as now explained, expresses the ordinary as well as the original meaning of the word, this meaning is in several instances modified by express legislative provision or equitable construction, and a special meaning is attachable to it, which in some cases is more and in other cases less extensive than that above alluded to. Thus in the Act 1663, c. 16, relating to the enforced labour of the vagrant and idle poor, which provides that one-half of the assessment for their maintenance is to be paid by the "heritors" according to their valuations, and the other half is to be laid upon tenants and possessors within the parish according to their means and substance, the term "heritors" includes not only wadsetters—as under the ordinary acceptance of the phrase it does—but also "liferenters" during the subsistence of their rights. Here, therefore, the phrase

(*a*) See *infra*, p. 544.

(*b*) Per Lord Moncreiff in *M'Neel v. Robertson*, 1836, 14 S. 849.

(*c*) *Arbroath Heritors v. Minister*, 1883, 20 S.L.R. 781. South Queensferry is perhaps another.

“heritors,” as explained by the statute, is used in a sense more extensive than its ordinary one, and includes a class of persons who are generally excluded from its scope. CHAP. XII.

14. Again, the provisions of the Act 1707, c. 9, which, *inter alia*, direct that the transporting of churches is to be with the consent of the heritors of three parts of four at least of the *valuation* of the parish, appear to imply that the term heritors as here employed is limited in its application to those landowners whose properties stand separately valued in the cess roll. A similar meaning seems to have been formerly applicable to the term as occurring in 7 and 8 Vict. c. 44, section 1, which makes the consent required that “of the heritors of a major part of the *valuation* of any parish.” The reason for this view arises from the circumstance that at the date of these two statutes, and until 1854, the only authoritative general system of the valuation of lands was that made up with a view to the cess and known as the valued rent. The Act 17 and 18 Vict. c. 91, has supplied a valuation of all lands and heritages according to their real rent, and accordingly, in all parishes of such a character that assessments would fall to be levied according to the real rent, the heritors whose consents would be required would be the real rent heritors.

15. By the term “heritor,” as used in the Glebe Lands (Scotland) Act, 1866, is meant the proprietor of any lands to the extent of at least £100 of real rent from land yearly appearing in the valuation roll of the county within which the particular parish is situated (*a*). The term “heritor” in the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, means any proprietor of lands and heritages liable in assessments which may be imposed according either to the real or the valued rents thereof, relating to building or maintaining churches or manses and designing sites therefor, designing,

(*a*). This has been interpreted as meaning proprietor of agricultural lands, — Russell 1898, 5 S.L.T. 334.

Meaning of “heritors” under 1707,

Under 7 and 8 Vict. c. 44.

Effect of 17 and 18 Vict. c. 91.

Under 29 and 30 Vict. c. 71, s. 2.

Under 31 and 32 Vict. c. 96, s. 1.

excambing, or adding to glebes or churchyards, and maintaining them (*a*).

SECTION IV.—*Real Rent and Valued Rent Heritors.*

Which body
are the heritors
in any parti-
cular parish?

16. In parishes where the assessments fall to be levied according to the valued rent, the valued rent heritors are alone entitled to meet and pass resolutions and take action as heritors. On the other hand, where the assessment is upon the real rent, all the owners of lands and heritages in the parish are heritors and entitled to act as such (*b*). Independently altogether of the provision of the Act of 1900 (*c*), noticed elsewhere, in many parishes where the assessment might legally be levied according to the real rent, the valued rent heritors have been content to bear the whole burden and to keep matters in their own hand. The question has never arisen whether a real rent heritor is entitled in such circumstances to insist upon a departure from this practice, so as, whilst imposing upon him a share of the burden, to admit him to a share of the control. Under the Act just referred to a two-thirds majority in value of the valued rent heritors have now the right to maintain the old system of valued rent. As indicated elsewhere (*d*), the question appears to be an open one whether in the same parish there can be two bodies of heritors, the valued rent heritors and the real rent heritors, the one body liable for certain ecclesiastical assessments and the other liable for certain others.

SECTION V.—*Body of Heritors acting as a quasi-Corporation.*

The heritors a
quasi-cor-
poration.

17. The heritors of the parish constitute a *quasi*-corporation *quoad* the management and disposal of those parochial

(*a*) In the case of *Magistrates of Glasgow v. Maclean*, 1902 (unreported), it was held that the magistrates in a purely burghal parish are not heritors within this definition.

(*b*) *Robertson v. Murdoch*, 1830, 8 S. 537. See *post*, Chapter XIII. as to the two kinds of parishes.

(*c*) 63 and 64 Vict. c. 20, s. 1.

(*d*) *Infra*, p. 541.

concerns in regard to which they are entitled at their own hand to take action. This doctrine was enunciated by the consulted Judges in the case of *Mauchline* (*a*) regarding the reparation of the parish church; and the footing on which the doctrine was there rested implies that it is applicable to cases generally in which a right of self-action in parochial matters is possessed by the heritors as an independent body. Such a right belongs to them in the matter of providing and maintaining the usual parochial ecclesiastical ground and buildings. In taking measures for the supply of these and other parochial requirements, the body of heritors act as a *quasi*-corporation, the result of which is that, subject to certain qualifications, the resolutions adopted by them in reference to such matters are binding on non-concurring and even on dissentient members of the body. These qualifications embrace the three following conditions, viz. (1) that the meeting at which the resolution in question is adopted has been duly called; (2) that the mode of procedure adopted in arriving at the resolution has been in itself regular; and (3) that in adopting the resolution the meeting has acted *bona fide*, i.e. neither dishonestly nor in a grossly careless manner.

How principle
qualified.

SECTION VI.—*Mode of calling Heritors' Meetings.*

18. The mode of calling meetings of heritors is regulated by section 22 of the Ecclesiastical Buildings and Glebes (Scotland) Act of 1868 (*b*), which provides—

How heritors'
meetings are
convened.

“Mode of calling meetings of Heritors.—Notwithstanding any law, statute, or usage to the contrary, meetings of heritors for any purpose whatsoever may be called in the following manner: that is to say, on the requisition of the clerk of the heritors, or of any heritor or heritors possessed of lands yielding one-fourth part of the total real rental of the parish, as the same shall appear on the valuation roll or rolls then in force, or valued at one-fourth of the total valued rent of the parish, as the case may be; or when he shall himself think such meeting expedient or necessary, the

(*a*) *Boswell v. Duke of Portland*,
1834, 13 S. 148.

(*b*) 31 and 32 Vict. c. 96.

CHAP. XII.

minister of the parish shall cause an intimation of the meeting to be given immediately after divine service in the forenoon, and circular letters containing a similar intimation to be sent to all heritors of the parish at least twenty-one free days before such meeting shall take place: Provided that where, in any parish, the number of heritors exceeds forty, it shall not be necessary to send circular letters as before provided, but in lieu thereof intimation of the meeting shall be given by the minister, by advertisement in a newspaper circulating in the county once during each of two successive weeks between the intimation from the pulpit before-mentioned and the day for which the meeting has been called."

Whether
section per-
missive.

19. It has generally been assumed that the above section is permissive only, but this is a doubtful view, and in every case when any new business of importance has to be transacted, and where there is not a perfect understanding among the heritors, and between them and the minister, it would be prudent to follow the statutory procedure. In many parishes meetings were in use to be called in the very way described in the statute, but with shorter notice than twenty-one days. It would be curious if in these parishes the statutory procedure as regards form of notice might be followed but the statutory *induciae* be disregarded. Yet this would seem to be the logical result of holding the provision to be permissive, and to save all former usages and customs in the matter. In any view, however, the proceedings at a meeting not summoned in the statutory way could be challenged only by a heritor, not by an outside party, and no heritor present at the meeting and not taking the objection could afterwards raise it.

Minister con-
venes meeting.

20. The section above quoted is exceedingly inartistically if not ungrammatically framed, but its provisions seem to import that where there is a requisition it is to be directed to the minister and that he is in all cases to convene the meeting. The expense of circulars or advertising is, however, a proper charge against the heritors and recoverable by the minister from them.

21. Although, as already indicated, it may be doubtful

whether the above section is merely permissive, it is thought that the heritors may, by formal resolution duly communicated to all members of the body, make other arrangements in regard to the calling of meetings. They may instruct their clerk in certain circumstances or upon a certain requisition to call a meeting of their body by circular. Such an instruction would not derogate from the right of the minister to call a meeting, or his duty to do so on receiving a statutory requisition.

CHAP. XII.

Can heritors make their own arrangements as to convening meetings?

22. In any view it is thought that a meeting properly convened may adjourn to another date, and that it is not necessary to repeat the statutory notice or to adjourn for the period necessary to allow time for that purpose. Such delays would in certain circumstances be intolerable. But where there is an adjournment, notice of the adjourned meeting should be sent by the clerk to all absent heritors or be advertised where the body is a numerous one.

Adjourned meetings.

23. The statute makes no provision for the calling of a meeting of heritors by the Presbytery, but where the Presbytery thinks it proper that a meeting of heritors should be held, they may instruct the parish minister to convene it. Sometimes the Presbytery deem it necessary to cite the heritors to meet them (*a*). This is a different matter from summoning a meeting of heritors, and the statutory provisions do not apply to it. The usual practice is to cite the heritors by intimation from the pulpit and by a circular letter to absent heritors, but notice from the pulpit alone is probably a legal citation (*b*). There is no prescribed *induciae*.

How heritors convened by Presbytery.

24. Where during a vacancy in the cure of a parish it becomes necessary to call a meeting of heritors, it is thought that the moderator of the kirk-session comes in place of the minister as the person by whom the statutory duties fall to be performed.

Case of vacancy in a parish.

25. In the case of heritors who from insanity or pupil-

Notice to heritors' guardians or agents.

(*a*) See *Walker v. Presbytery of Arbroath*, 1876, 3 R. 498; *affd.* 4 R. (H.L.) 1.

(*b*) *Ibid.* and see cases cited, p. 579.

larity are unable to act on their own behalf, written notices of the meeting ought also to be sent to one or more of their known guardians or agents. The adoption of this course is advisable even in regard to heritors who are *minors puberes*—the reason being, that as legal incapacity to act on their own behalf does not exempt heritors from liability for or in connection with parochial burdens or assessments, those entrusted with the management of their persons or property ought to be made aware of the calling of meetings at which resolutions may be passed which will directly affect the pecuniary or patrimonial interests of their wards or clients.

SECTION VII.—*Constituting Meeting, and appointment of Chairman and Clerk.*

Election of
preses.

26. When the day and hour of the meeting have arrived, the persons assembled in terms of the notice are next to be formally constituted a “meeting” for despatch of the business for which they have been convened. With this view a preses or chairman is to be elected, and if there be no regular heritors’ clerk, a clerk appointed. As the qualification of each individual entitled to attend and take part in the business of the meeting is the same, viz. the fact of heritorship, no one of the heritors is in point of law entitled to claim the office of preses. This is an office to be conferred by the choice of the persons present, and is determinable by the voice of the majority as ascertained by the plurality of their votes.

Clerk to the
meeting.

27. When there is at the time a person holding the office of clerk to the heritors, he will naturally officiate as such at the meeting. The appointment, however, of such an officer, who is merely a private servant engaged by the heritors at their convenience, is not a matter of requirement. Accordingly, the heritors of a parish have sometimes no clerk. When this is so, or when the person who holds the post is absent or otherwise incapacitated from acting, a special

nomination of a clerk to the meeting is made. This course was adopted in the case of Cadder (*a*).

28. It is the duty of the clerk to be present during the diet of meeting to take accurate notes of the *res gestæ*, including in particular the appointment of the chairman and the names of the heritors who compose the sederunt; all motions and amendments, and by whom made and seconded, with the result of the vote thereon as announced by the chairman; and any other important act done or special matter of business brought under consideration, and also when and how the meeting was terminated—by adjournment or otherwise. From these notes the clerk should, either at the time or immediately afterwards, prepare the minutes of the meeting. When a report by a man or men of skill, or others, is made to the meeting, the minute should contain a correct statement of such report if a verbal one; while, if it be a written report, it should either be engrossed *ad longum*, or be specially referred to in the minutes as forming part of them.

Clerk's duties.

Minutes of meeting.

29. These minutes constitute the formal record of the proceedings at the meeting, and as the body of heritors of each parish has a recognised legal status—*quoad* the despatch of the parochial business above alluded to—it seems to follow that when the minutes as approved of are duly signed they become admissible as evidence, if indeed they do not constitute the proper evidence to prove what passed at the meeting (*b*). Accordingly it is the duty of the clerk to obtain the signature of the chairman to the minutes when and as approved of. Where a minute is written out and adopted at the meeting to which it relates, it should be signed by the chairman of that meeting; but where the minute is not so

Minutes formal record of proceedings.

(*a*) Campbell *v.* Stirling, 4th March 1813, F.C., 6 Paton, 238; and Session papers, F.C. 1812, No. 67, Petition for Defenders, p. 2.

(*b*) See the ratio of judgment on

this point in Campbell *v.* Stirling, also Fergusson *v.* Skirving, 1850, 12 D. 1145. Dickson, Evid. s. 1215, *et seq.*

CHAP. XII.

Authentication
of minutes.

written out at the time, but is submitted for approval to a subsequent meeting, there can be no doubt that the proper person to sign the minute is the chairman of the meeting at which the minute is approved (*a*). It is further the duty of the clerk on no account to make, or permit to be made, on the minutes after approval any, even the most trifling, alteration. In the case of Cadder (*b*) it was, *inter alia*, ruled that the minutes of the meeting of heritors could not be looked at as unexceptionable evidence of what took place thereat, in respect that certain alterations had been made on them by the clerk after the meeting was over.

SECTION VIII.—*Right and mode of Voting at the Meeting.*

Each heritor
entitled to
vote.

30. Each heritor of the parish present is, as a general rule, entitled, subject to the control of the chairman, to be heard and to vote on all matters submitted to the consideration of the meeting. Each heritor constitutes a unit of the members composing the meeting, and as such is entitled to a vote. Hence the votes are *per capita*, each vote being of equal value or effect in deciding the fate of a particular motion. The only exception to this principle occurs in those cases where, by special statutory provision, a different arrangement is either enjoined or implied; as, for instance, in the disjunction of parishes (*c*), where it is not the number of votes but the amount of the heritors' respective valuations which determines the requisite consent.

Voting by
proxy.

31. Absent heritors who are entitled to be present may be represented and vote by proxies. This point was affirmed, or at least assumed, as undoubted in the case of Cadder (*d*);

(*a*) See *Ferguson v. Skirving*, *supra*. See also *Great Northern Railway Company v. Inglis*, 1851, 13 D. 1315; *affd.* 1 Macq. 112. The practice followed in many public bodies whereby the person who was in the chair at the meeting of which the minute is the record signs it, al-

though not present when the minute is approved of, is improper, as the approval is the warrant for signature.

(*b*) *Campbell v. Stirling*, *supra*.

(*c*) Under 1707, c. 9, as amended by 7 and 8 Vict. c. 44.

(*d*) *Campbell v. Stirling*, *supra*.

and in *Robertson v. Murdoch* (a), where an objection to votes by proxy was repelled, the right so to vote at heritors' meetings, generally including those for providing or maintaining parochial ecclesiastical accommodation, was held legal in respect of long if not universal custom. Numerous cases might be mentioned in which absent heritors have *de facto* voted by proxy at such meetings without successful challenge (b).

32. In *Cullen v. Sprott* (c), dealing with it as a case under the Act 1690, c. 23, which, however, it was not, the Lord Ordinary expressed the opinion that mandates authorising another to vote in the election of an assistant and successor to the minister under that Act required either to be probative or holograph of the granter. In the above case of Cadder, however, it was maintained, and apparently without authoritative contradiction, that such mandates do not require to be probative in terms of the Act 1681, c. 5, and several of the proxies there used were neither tested nor holograph (d). There can be little doubt that practice has now fixed the law as supporting heritors' mandates which are neither holograph nor tested.

33. The mandate, however, ought to be explicit in its terms, distinctly authorising the proxy to appear and vote at the meeting at which it is proposed to be used. It must also be executed in conformity with the rules applicable to the law of mandate and to instruments falling within this legal category. Hence, in the case last mentioned, the objection to a proxy granted by a *minor pube* was sustained that it bore to be granted in name of and was signed by the guardians of the minor only, and not by her with their consent.

34. By the Act 27 Vict. c. 18 (e), being an Act to grant

Form of
proxies.

Must they be
holograph or
probative?

Proxies should
be explicit and
valid *qua* man-
dates.

Stamp on
proxy.

(a) 1830, 8 S. 587. Here Lord Justice-Clerk Boyle, p. 590, relies on the case of Cadder as sanctioning the principle of voting by proxy.

(b) See *Maxwell v. Gordon*, not reported in Court of Session, House of Lords, 1816, 4 Dow, 279; *Shaw v.*

Forbes, 1827, 5 S. 761, affd. 4 W. & S. 300.

(c) 1841, 3 D. 561.

(d) See Session papers, *Campbell v. Stirling*, F.C. 1812, No. 67, Petition for Defenders, p. 14, foot.

(e) See schedule C.

CHAP. XII

certain duties of custom and inland revenue, it is provided that a charge of one penny shall be made for a letter or power of attorney, commission, factory, mandate, or other instrument in the nature thereof, for the sole purpose of appointing or authorising any person to vote as a proxy or otherwise at one meeting (1) of the proprietors of a joint stock or other company; (2) of any body exercising a public trust throughout the kingdom; or (3) at one parish meeting of heritors or proprietors of real or heritable property in Scotland. The Act further provides that voting papers, when required for voting at such meetings, are to be impressed with a penny stamp. The result seems to be that mandates by absent heritors, authorising proxies to vote for them at the heritors' meetings now referred to, must be impressed with or have affixed thereto a penny stamp, but as voting orally at such meetings is the recognised mode of procedure, stamped voting papers at such meetings are not necessary.

Voting papers.

Right of
female heri-
tors to vote.

35. While female landowners do not in general attend heritors' meetings, they are probably entitled to do so and to vote personally thereat. In *Brown v. Johnstone* (a), where, under a disposition of a right of patronage to the magistrates of the burgh and the heritors and others of the parish of Rutherglen, a meeting was called for the appointment of a minister, which was attended by a variety of persons, including females, it was, *inter alia*, held that women, if otherwise qualified, could vote. This goes so far in the direction now suggested. In any view, the case of *Cadder* (b) seems to imply that female heritors may exercise the right of voting at heritors' meetings by means of proxies.

Right of minor
heritors to
vote.

36. The rubric to one of the reports (c) of the above case of Rutherglen bears "that minors might" vote, "their curators, " where they any had, consenting," thus suggesting the inference that a minor heritor, when he has no curators, was

(a) 1830, 8 S. 899, and 5 F.D. 739.

(b) *Campbell v. Stirling*, *supra*.

(c) See 8 S. 899.

by himself entitled to vote. This doctrine, however, is not distinctly deducible from the terms of the report itself or from that elsewhere (*a*) given, and it is made more doubtful by a MS. note by one of the reporters (*b*) on the Session papers in these terms,—“Refuse, with variation as to minors *“with consent of their curators.”* Read in connection with the interlocutor of the Lord Ordinary, this note seems rather to contradict the rubric in question. Maclaurin (*c*) notices the point as having been decided in *Hay v. Hepburn* (*d*), that a minor could not vote as a commissioner of supply at the election of a collector of the cess. The judgment pronounced in this case seems to be rested on the principle that a minor cannot hold an office which involves the exercise of judicial functions. For it was here held that as a commissioner of supply is, by the nature of his office, a judge (and also liable as a cautioner for the collector), a minor was not eligible for appointment as such, and therefore on this ground an objection to his vote was, in a competition between two persons for the post of collector, sustained. Hence the ratio of this decision does not apply to the matter of voting at heritors’ meetings generally, and, unless ruled by the case of Rutherglen (*e*), it would rather appear that the point has not yet been *in terminis* decided whether a minor without curators is entitled to take part in and vote at such meetings.

37. The point seems less doubtful whether a minor heritor having curators can vote at the meetings in question without their concurrence. Legal principle seems to point clearly to a negative conclusion, and the case of Rutherglen may perhaps be regarded as supporting if not affirming this view. Voting by proxy at heritors’ meetings being recognised, a minor heritor having curators may, with their consent, grant a mandate to another to attend and vote

Minor heritors
having cura-
tors.

(*a*) See 5 F.D. 729.

(*b*) Lord Justice-Clerk Boyle.

(*c*) Points of law, p. 77.

(*d*) 1735, M. 8929.

(*e*) *Brown v. Johnstone*, *supra*, 8 S. 899.

CHAP. XII.

for him. The mandate, however, if executed by the minor alone, would not, it is apprehended, be effectual, and, as the case of *Cadder (a)* decides, the mandate would be invalid if granted by or in name of his curators alone.

Pupil and
insane heritors.

38. As pupillarity is in the eye of the law a state of absolute incapacity, heritors who are pupils—and a similar remark applies to those who are insane—are not entitled, because not competent, to vote at heritors' meetings. The interests of all such heritors must be attended to and protected by their guardians, one of whom may be authorised and deputed by the others to represent them and take part in the proceedings and vote at the meeting on behalf of their ward, or they may concur in granting a special mandate to this effect to a person not of their number as their proxy.

SECTION IX.—*Nature and extent of the Chairman's right to vote.*

Chairman's
right to vote
at common
law.

39. The principle upon which, at common law, the nature and extent of the right of the chairman of an ordinary meeting to vote depends is not clearly fixed. It has been maintained that, having regard to the true character of the duties to be discharged by him, expediency and propriety require that his position at the meeting should be a disinterested and an impartial one; that in order to secure, as far as possible, this result, he should not be entitled *qua* individual to exercise any direct influence on its deliberations by voting on any motion proposed, and that he should be entitled to vote only in the event of an equal division of opinion among the ordinary members of the meeting—as it were *ex necessitate*, and in order *qua* chairman to extricate matters from a dead lock. On the other hand it has been argued that so to limit the right of a chairman to take part in the business of a meeting would in many cases be to exclude him from the

Alternative
views on the
subject

(a) *Campbell v. Stirling*, 4th March, 1813, F.C. ; 6 Paton, 228.

exercise of a personal right or privilege in violation of the rule *nemini officium suum debet esse damnosum*. There appears to be considerable plausibility in both views: The instances in which the former rule applies are various. Thus, the presiding Judge in the High Court of Justiciary, the presiding Judge in the Teind Court in its discretionary character (*a*), the Speaker in the House of Commons (*b*), and the Moderator of the General Assembly, or of a Synod, Presbytery, or Kirk-Session (*c*), each has only a casting vote but no deliberative vote. On the other hand, it appears as the result of judicial decisions and *dicta* on the subject that at common law, and apart from statute or inveterate usage, the preses of ordinary meetings, such as those of heritors, has not a casting vote but only a deliberative vote.

Instances of a casting vote.

40. On this principle it was held in *Thom v. Dalrymple* (*d*) that in the election of the Rector and other officers of King's College, Aberdeen, the Principal, who was *ex officio* chairman of the meeting, was not entitled to a double or casting vote. In *Playfair v. MacDonald* (*e*), reversing the judgment of the Court of Session, it was decided, but solely and exclusively in respect of usage to this effect, which was held to have prescribed the rule in the matter, that the Principal of the United College, St. Andrews, was entitled both to a deliberative and a casting vote. Conflicting opinions were expressed by the Judges of the Court of Session in this case as to the law

Thom v. Dalrymple.

Playfair v. MacDonald.

(*a*) See *Pearson v. Magistrates of Dunbar*, 1862, 24 D. p. 1360, top. Formerly the Lord President of the Court of Session also had only a casting vote. Thus, see *M'Garroch v. Scott*, 1740; *Elchies, Stipend*, 2, see Notes, and *Heritors of Lanark v. Crown Factor*, 1753, *Elchies, Patronage*, 6, and Notes. The effect of the 48 Geo. III. c. 151, however, and subsequent statutes, has been to confer on the President of each Division of the Court a deliberative vote, and none other.

(*b*) See *May's Parliamentary Practice*, 6th ed. p. 343. It is otherwise with the Speaker of the House

of Lords, who (when a member of the House) has a deliberative vote merely, the forms of procedure of the House—in both its legislative and its judicial capacities—being such, that equality of votes has a practical or operative effect in determining the fate of the bill or appeal. Hence the necessity for a casting vote is superseded.

(*c*) See *Hill's Practice of the Church of Scotland*, 4th ed. p. 4.

(*d*) Not reported in Court of Session, —House of Lords, 1763, 6 Paton, 737.

(*e*) Not reported in Court of Session, —House of Lords, 1809, 5 Paton, 266.

CHAP. XII.

on the point in question. Thus, Lord Meadowbank said, "It is founded on common sense that the *dignior persona* must have a preponderance, and therefore a double vote." This view was substantially that adopted by Lord Woodhouselee. On the other hand, Lord Justice-Clerk Hope, with whose opinion Lords Hermand and Armadale concurred, said, "I think there is no double vote, and that nothing but "statute or inveterate custom can bestow this;" while the view of Lord Craig was that the Principal must either have two votes or none at all (a).

Import of the
case of Cadder.

41. In the case of Cadder (b) it was authoritatively decided that the preses chosen by, and being himself one of the members of a meeting of heritors convened for the election of an assistant and successor to the parish minister, under the Act 1690, c. 23, was not entitled to a casting vote, while the judgment recognises that he was entitled to a deliberative vote. Assuming, as may fairly be done, the view that the decision in this case was rested on no specialty, it seems to settle the doctrine as above stated, viz. that at common law, and apart from statutory provision, the chairman of an ordinary meeting of heritors is not entitled to a double vote, and that the vote which he may give is an original or deliberative and not a casting vote. The application of this rule in the case of an equal division of unexceptionable votes on a given resolution, would be that *quoad hoc* the meeting would prove abortive. This is a serious practical objection to the rule, and affords a strong argument against its soundness, or at least its convenience. In the same case the point was raised but not decided, viz. whether a meeting could by consent, actual or constructive, evade the rule, and specially confer on the chairman, and as a condition of his appointment, a right to exercise a casting as well as a deliberative vote.

(a) See 5 Paton, p. 271.

(b) Campbell v. Stirling, 4th March 1813, F.C. ; affd. 6 Paton, 238.

SECTION X.—*Effect of Resolutions adopted at Heritors' Meetings.*

CHAP. XII.

42. If a heritor consider himself aggrieved by any resolution passed at the meeting, his remedy was, and apparently still is, to apply for redress to the Court of Session, who, as laid down in the case of *Mauchline (a)*, possess authority "to control and direct the body of the heritors" in their proceedings referred to. Mere dissent, however, although accompanied by the proper precautionary step of a protest, will not necessarily protect the heritor against the operative effect of the resolution. To secure such protection he ought to bring the resolution complained of under review in competent form. Formerly the mode of doing this was by suspension or advocacy, according to the nature and practical effect of the resolution. By the Act 31 and 32 Vict. c. 100, section 64, however, the process of advocacy was abolished; and although a resolution passed at a meeting of heritors can scarcely be with propriety styled a judgment of any Sheriff or other "inferior Court or Judge," as specified in the succeeding section, such a construction, it is suggested by Mr. Duncan, may perhaps be put upon it, to the effect of permitting review by way of "appeal" in lieu of that by way of advocacy, otherwise reduction would have to be resorted to where suspension was inappropriate.

Course to be taken by a dissident heritor.

Mode of review.

43. Although on the refusal or failure of the heritors as a body to take self-action in any of the matters now alluded to, the Presbytery of the bounds are entitled to adopt such measures as in their opinion may be necessary, this power of procedure is not such as to confer on Presbyteries a right to give practical relief to one or more heritors against the resolutions of a majority.

Presbytery not court of review.

44. In the case of *Newtyle (b)* the point was raised—but,

(a) *Boswell v. Duke of Portland*, 1834, 13 S., per consulted Judges, p. 154.

(b) *Whitton v. Lord Wharncliffe* 1869, not reported; Pursuers' Agents, Jardine, Stodart, and Frasers, W.S.

CHAP. XII.

Can a resolution of one meeting be recalled?

Alternative answer suggested.

under an arrangement of parties, was withdrawn from judicial consideration—whether, after a particular course of action—such as rebuilding, as opposed to repairing merely, the church or manse—has been adopted by a resolution duly passed at one meeting of heritors, such resolution can at a subsequent meeting of heritors competently be recalled and negatived by a counter resolution, and the adoption of a different and inconsistent course of action be thereby affirmed. This question appears susceptible of an alternative answer. Where nothing of a practical nature has followed upon the first resolution, and, *res sunt integræ*, there seems no reason why it may not be competently recalled and followed by a different resolution. A resolution by a body of heritors is just a formal expression of their will; and in point of principle they seem as much entitled to change their opinion on a particular subject as they were entitled to form it originally. On the other hand, if something practical has been done under the resolution, and *res non sunt integræ*,—as, if expense has been incurred; or a transaction entered into by some of the heritors; or a contract concluded with a third party on the faith of it,—then the case of *Mauchline* (a) tends to support the view that the counter resolution would in such circumstances be void or voidable by the parties interested to maintain the binding character of the original resolution; or otherwise, that if the counter resolution is to receive effect, its promoters should be bound to make good the loss or damage incurred, so far as directly consequent on the change of mind on the part of the body of heritors, which such counter resolution implies.

Resolution regularly carried binds the body.

45. When due notice of the meeting at which a particular resolution is adopted has been given to the heritors, when the resolution is competent in itself and has been passed

(a) *Boswell v. Duke of Portland*, 1834, 13 S. 148.

in a formal and regular manner, and when in adopting it the meeting, or those by whose influence or votes it was carried, have been acting honestly in the matter, the result—as was laid down in the above case of Mauchline (*a*)—is that each heritor is bound by such resolution and by the acts generally of the meeting, “whether he be sane or insane, “major or minor, present at the meeting or absent, voting “with the majority or with the minority, acquiescing in or “protesting against what is done.”

46. The number attending a meeting of heritors makes no difference as regards the powers of the meeting. If the meeting be regularly called and only one heritor be present, a resolution duly taken and minuted by him binds the whole body (*b*). One heritor a quorum.

47. There is very little authority upon the question as to the rights or remedies of a heritor when his co-heritors have come to an improper resolution and have carried or propose to carry it out. If the impropriety amounts to positive illegality, there can be no doubt of the right of the dissentient or absent heritor to redress. Short of this, however, even in regard to discretionary matters, the absent or dissentient heritor will have relief against his co-heritors if their action be fraudulent or grossly reckless or wilfully negligent (*c*). In the absence of fraud, which is very unlikely to occur in such a case, the *culpa* must be gross to entitle a heritor to redress, and probably the fault will be more strictly judged of where the heritor is present at the meeting when the resolution is taken, points out the error, and protests, than where he is absent. Mr. Duncan regards the heritors present at a meeting as mandatories for the whole body, and as responsible upon this principle and to this extent. The single heritor absent or present and protesting cannot recall that mandate or protect himself Redress of heritor against wrongous action of majority.

(*a*) *Ibid.* per consulted Judges, p. 154.

(*b*) *Ibid.*

(*c*) *Ibid.*

CHAP. XII.

Unauthorised
action of com-
mittee.

against the consequences of its exercise unless the *culpa* is of the gross character above indicated.

48. In the unreported case of Bathgate (*a*) it was found that where a committee of the heritors appointed to carry out the rebuilding of the church had spent thereon a sum largely in excess of what the meeting of heritors had authorised, the heritors who were not members of committee were entitled to relief against the members of the committee.

Expenses of
litigation.

49. Where the heritors as a body litigate, all who concur in the litigation are liable *inter se pro rata* according to their valuation for a share of the expenses. The liability of non-concurring heritors will depend upon the circumstances of the case. If it were sought to evict the heritors from a portion of the burying-ground, or to erect buildings which would interfere with the amenity of the church, all the heritors would undoubtedly be liable in the expenses incurred in successfully resisting such invasions of the common right. On the other hand, if a majority of the heritors were to insist that the church was repairable, and were unsuccessfully to litigate this matter in the Sheriff Court and the Court of Session, a dissentient minority of heritors would not be liable in any share of the expenses. In the first case figured the heritors successfully protect their fiduciary rights, in the second they unsuccessfully endeavour to protect their own pockets. The cases are more doubtful (1) where the heritors unsuccessfully endeavour to resist what they believe to be an encroachment upon their fiduciary rights, or (2) where they successfully protect their own pockets and those of their dissentient co-heritors and fail to recover their full costs. Each case of the kind will fall to be judged of according to its own circumstances and the reasonableness of the action of the one party or the other.

(*a*) Johnston v. Cowan, 1886, First Division (unreported).

CHAPTER XIII.

ON HERITORS' ASSESSMENTS.

SECTION I.—*Rule of Assessment on Heritors for ecclesiastical purposes.* CHAP. XIII.

1. Neither the Act of Privy Council of 1563, nor the statute 1572, c. 54, by which the burden of providing and maintaining church accommodation was originally imposed on heritors, specifies the rate or standard of liability according to which they are to be assessed for payment of the expense in connection with the discharge of this statutory obligation, nor is there any rule in the manse statutes, although there is ample authority that, speaking generally, the rule for the church assessment is the rule for the manse assessment (*a*). The introduction, at an early period, of the system of valuation known as that of the "valued rent," explained above (*b*), according to which the public tax of the cess was imposed, affording as it did a convenient rule for levying other rates, was also adopted as that for levying various parochial burdens, including the one under consideration. This is deducible not only from the remarks of various of our law writers (*c*), but also from judicial *dicta* and decisions (*d*), which plainly indi-

Rule of the
valued rent.

(*a*) See per Lord Braxfield in *Dundas v. Nicolson*, 1778, 2 M. 8511, 2 Hailes, 802; per Lord Robertson in *Cunninghame v. Deans*, 12th Dec. 1811, F.C.; and per Lord President Boyle in *Heritors of Orlig v. Phin*, 1851, 13 D. 1335, top.

(*b*) *Supra*, p. 11.

(*c*) Thus Forbes, *Tithes*, p. 209, says that all parochial burdens "are proportioned to the *valuation* of every heritor's lands in the parish;"

and Erskine, *Inst.* ii. 10, 63, says that landholders "must bear the expense of repairing and even rebuilding the parish church according to the *valuations* of their several lands." Both these passages refer to the *valuation* of lands as entered in the cess books. See also Connell *Par. Supp.* p. 27, commenting on the judgment in the Peterhead case.

(*d*) See *dicta* and cases mentioned in subsequent footnotes.

CHAP. XIII.

cate that the original rule of assessment for parochial burdens generally was that of the valued rent; and that the rule of the real rent, adopted in certain circumstances, was to some extent an innovation on the former practice. It is, however, to be observed that the practice of imposing church assessment according to the valued rent did not arise from statutory requirement, but that convenience and economy, rather than any other reason, were probably the grounds of its adoption (*a*). The effect of the modern Valuation Act on the subject is afterwards adverted to. Meanwhile the law on the matter, as it existed prior to the date of this Act, will now be explained.

tate of the law
on the subject.

2. Formerly the expense of repairing, enlarging, or rebuilding the church was, as a general rule—and apart from arrangement or resolution by the heritors to a different effect—defrayed by an assessment imposed on the body of heritors according to the valued rent of their respective lands. Forbes and Erskine, in the passages quoted, adopt this view. It is distinctly expressed in judicial *dicta* (*b*), and its accuracy is established by the cases of Lochmaben (*c*), Kinghorn (*d*), Crieff (*e*), and Peterhead (*f*), all of which clearly attest the adoption, in rural parishes, of the valued rent as the rule of assessment. Further, while these cases show that the Court of Session was inclined to apply the same rule of assessment in the rural district of a partly urban parish, the Peterhead case shows that the House of Lords considered

(*a*) This is the ground on which the adoption of the rule of the valued rather than the real rent is rested, in *Steele v. His Parishioners*, 1712, M. 5131, 3*tio*, and 8498, 3*tio*.

(*b*) Thus, in *Dundas v. Nicolson*, 1778, M. 8511, Lord Braxfield says, 2 Hailes, 802, "The valued rent is the general rule for parochial burdens; and upon the whole it is a good rule; but when it chances not to be equitable, it is departed from, as in the case of a royal burgh, where there is a landward parish." Again, in *Feuars v. Heritors of Crieff*, 1781,

M. 7924, Lord Alva says, 2 Hailes, 893, "We must not depart from the general rule as to landward parishes, as to which the *valued* rent has been the rule; but *that* will not apply *here*."

(*c*) *Steele v. His Parishioners*, 1712, M. 5131.

(*d*) *Sinclair v. Heritors of Kinghorn*, 1761, M. 7918.

(*e*) *Feuars v. Heritors of Crieff*, *supra*, M. 7924.

(*f*) *Harlow v. Merchant Maiden Hospital*, 1802, 4 Paton, 356, not reported in Court of Session.

this rule inappropriate to such a description of parish, and applied the rule of the real rent, *i.e.* of the actual value of the lands or heritages at the time of the assessment.

3. In the case of Kinghorn (*a*), where the parish was burghal-landward, the ancient usage had been to divide the expenses incurred in repairing the church and manse into two equal parts, whereof one was payable by the burghal and the other by the landward district. In 1759 the magistrates suspended a charge on them for one-half of an assessment of £102:18:10 for repairs on these buildings, on the ground that such an amount was excessive. The Lord Ordinary found them and the landward heritors both liable according to the rule of the valued rent; but on review, of this judgment, the Court, of consent, found them liable in one-half of the cost, according to former usage. In 1897 the question was revived on the occasion of very extensive repairs of the church, but the Court held that the decision of 1759 had fixed the rule for the repair of that church (*b*).

4. In the case of Crieff (*c*), in 1781, where the parish was partly urban, the Court of Session ruled that the assessment for the cost of a new church should be divided between the rural and the urban district, in proportion to the amount of accommodation necessary for the inhabitants of each district respectively, and that the respective amounts should be imposed on the rural heritors according to the valued rent, and on the inhabitants of the urban district according to the real rent of their respective properties. This rule of assessment was again applied by the Court of Session in the subsequent case of Peterhead (*d*), where also the parish was partly urban. On appeal, however, the House of Lords, reversing this judgment, decided that there should be no division as between the urban and the rural districts;

(*a*) *Sinclair v. Heritors of Kinghorn*, 1761, M. 7918.

(*b*) *Heritors of Kinghorn v. Magistrates of Kinghorn*, 1897, 24 R. 704.

(*c*) *Feuars v. Heritors of Crieff*, *supra*, M. 7924.

(*d*) *Harlow v. Merchant Maiden Hospital*, 1802, 4 Paton, 356, not reported in Court of Session.

CHAP. XIII.

that one uniform rule of assessment was to be applied to both districts of the parish, and that in a parish partly rural and partly urban this rule should be according to the present and actual or real rent of the whole property in the parish, in contrast to the valued rent thereof as entered in the cess-books.

Cases of
Mauchline,

5. The principle involved in this decision was, in the case of Mauchline (*a*), applied to a parish which consisted of a landward district and a village, composed of from 300 to 400 houses, chiefly built on small feus. Here the assessment for rebuilding the church was, notwithstanding an alleged uniform practice to the contrary, imposed on the owners of lands and houses within the parish according to the real rent thereof (*b*).

Campbelton,
and Forfar.

6. In the earlier cases of Campbelton (*c*) and of Forfar (*d*), as in the case of Crieff (*e*), already mentioned, the Court of Session seem to have imposed the *cumulo* assessment for the expense of a new church on the two sections of the parish, according to the standard, not of the value of the property in each district, but of that of the population, and the relative amount of church accommodation required by its inhabitants. But, as above pointed out, the House of Lords decided, in the case of Peterhead, that the former rule of liability, and not the latter, was the one which was to be adopted. This rule, as above stated, has since been applied in the case of parishes with an urban element, and is now fixed to be the proper rule of assessment in all such parishes (*f*), except (1) in the

Fixed rule of
assessment in
urban parishes.

(*a*) Boswell *v.* Hamilton, 1837, 15 S. 1148.

(*b*) Here all the lands of which the different feus formed parts were valued in the cess-books of the county; and in allusion to this condition of matters, Lord Gillies says, 15 S. 1150, "There is, at least, no necessity for taking the real rent of the feuars. They may be assessed in proportion to the share of valued rent effeiring to their respective feus."

(*c*) Duke of Argyle *v.* Rowat, 1775, M. 7921. The report in this case, how-

ever, is not very clear upon this point.

(*d*) Ure *v.* Carnegie, 1793, M. 7929.

(*e*) *Supra*, p. 536, note (*b*).

(*f*) The principle involved in this judgment was given effect to by the House of Lords in their remit to the Court of Session in Maxwell *v.* Gordon, 1816, 4 Dow, 279. In the Earl of Glasgow *v.* Miller, 1831, 9 S. 370, *affd.* 7 W. & S. 185, the assessment for rebuilding the parish church of Neilston, which contained one or two villages, but no burgh, was laid on by the collector (Miller) according to the *valued*

case of an assessment for the repair of a church the seats in which have been allocated according to the valued rent, in which case the assessment still falls to be imposed according to the valued rent under a statutory rule (*a*), or (2) where two-thirds in number and value of the valued rent heritors resolve to continue the assessment upon the valued rent (*b*).

7. From the date of the Peterhead case down to the passing of the Valuation Act in 1854, there was a wide discrepancy between the law and practice. In a great many parishes the assessment would by law have fallen to be imposed according to the real rent, but in practice this mode of assessment was very seldom adopted, for the reason that there was no valuation according to the real rent under which an assessment could be levied, and the levying of an assessment in this way was accordingly inconvenient. On the passing of the Valuation Act in 1854 this difficulty was removed. Thereafter in many cases assessments were imposed according to the real rent. But there remained, as there still remain, many parishes in which, although in strictness the assessment ought to be imposed according to the real rent, nevertheless, influenced by custom, by good feeling, or by the desire to keep matters in their own hands, the valued rent heritors have continued to bear the whole burden according to the valued rent assessment.

8. The real point of difficulty in connection with this question is to determine what constitutes an urban parish, within the principle of the judgment in the case of Peterhead. A parish is regarded as partly urban which contains a considerable number of feuars, or occupiers of houses in close

Practice prior
to the Lands
Valuation Act.

Application of
the rule—
urban or rural.

rent. When the case was carried by appeal to the House of Lords, he there expressed his willingness that the assessment should be imposed according to the *real* rent (see 7 W. & S. 196). The result of the case, however, which negatived the Presbytery's right to

insist on the church being enlarged, superseded the necessity of any judicial opinion being expressed on this subordinate point.

(*a*) 17 and 18 Vict. c. 91, s. 3;
31 and 32 Vict. c. 96, s. 22.

(*b*) 63 and 64 Vict. c. 20, s. 1.

CHAP. XIII.

proximity to each other, although no burgh, town, or even large village exist within it (*a*). In a country parish which contains no such population the valued rent may still be regarded as a very rude and approximate index of the relative value of agricultural land, but where land has now a greater value, other than agricultural, as by building or the construction of railways or other works, the valued rent is no longer regarded as affording any index, and the real rent is resorted to. "Where equity as regards the incidence of the law on the assessable subjects within the parish cannot be secured by taking the valued rent, and can be reached only by taking the real rent as the basis of apportionment, this last must be adopted" (*b*). Indeed the tendency of judicial practice and opinion is to impose the assessment for parochial burdens generally according to the rule of the real rather than of the valued rent.

Tendency to
adopt rule of
the real rent.

SECTION II.—*Effect of the Lands Valuation Act of 1854.*

Import of the
Valuation Act
of 1854.

9. As its preamble bears, the object of the Valuation Act (17 and 18 Vict. c. 91) is (1) to establish a uniform valuation of all lands in Scotland, according to which all *public* assessment leviable at its date *according to the real rent* may be imposed; (2) to strike this uniform valuation according to the rule of the real rent or actual value of the lands for the time; and (3) to appoint the mode in which this is to be done. The Act applies to ecclesiastical assessments which fall to be levied according to the real rent (*c*).

Not a taxing
statute.

10. The Act is not a taxing statute, but merely one for valuing properties. It has not created any new liability to assessment, but has merely regulated the mode in which

(*a*) In *Macfarlane v. Monklands Railway Company*, 1864, 2 M.P. 519, an opinion to this effect was expressed *quoad* manse assessment.

(*b*) Per Lord Cowan in *Highland*

Railway Company v. Heritors of Kinclaven, 1870, 8 M.P. at 861.

(*c*) See *Traquair v. Heritors of Innerleithen*, 1870, 9 M.P. 234.

assessments leviable under existing liability are to be calculated and imposed. Hence, tenants under leases of more than twenty-one years, although "proprietors" of the lands in the sense of section 6 of the Act, are not thereby made liable in the expense of rebuilding the parish church (*a*). On a similar principle, a liferenter, although a "proprietor" within the meaning of section 42 of the Act, would likewise appear to be entitled to claim exemption from liability. Where lands are let upon a long lease the proprietor must pay an assessment levied according to the real rent upon the valuation of the lands as appearing upon the valuation roll, although the rent payable to himself may be of far less amount (*b*). The Act contains a proviso (section 33), re-enacted by section 23 of the Ecclesiastical Buildings and Glebes Act, 1868 (*c*), to the effect that assessments for the repair of churches, the areas of which have been divided according to the valued rent, are to be imposed according to the valued rent. The rule of liability as regards other assessments, whether according to the real or the valued rent, is not regulated by the statute in question, but by the rules of law in force prior to its date (*d*).

CHAP. XIII.

No new liability created by it.

How far rule of assessment affected by it.

11. Doubts have been suggested as to whether the provision in the Acts of 1854 and 1868, above adverted to, that assessments for the repair of a church, the seats of which have been allocated according to the valued rent, are to be imposed according to that valuation, applies to all the other heritors' assessments in a parish so situated. An opinion in the affirmative was indicated by Lord M'Laren, and apparently concurred in by his brethren, in the case of the *Trades House of Glasgow v. Heritors of Govan* (*e*). There

Manse assessments where church area allocated according to valued rent.

(*a*) M'Laren v. Clyde Trustees, 1865, 4 M.P. 58; affd. 6 M.P. (H.L.) 81.

(*b*) Traquair, *supra*.

(*c*) See Appendix, p. 668.

(*d*) Bruce v. Bruce, 1873, 11 M.P. 755. See also Macfarlane v. Monk-

lands Railway Company, 1864, 2 M.P. 519; and Scottish North-Eastern Railway Company v. Gardiner, *ibid.* 537; Highland Railway Company v. Heritors of Kinclaven, 1870, 8 M.P. 858.

(*e*) 1887, 14 R. 910.

CHAP. XIII.

were other grounds of judgment, however, in that case, and in the earlier case of *The Duke of Abercorn v. The Presbytery of Edinburgh* (a) Lord Cowan seems to read the exception as limited to the case of church repairs. This latter view is certainly the natural construction of the words of the statute, and is in conformity with practice both prior and subsequent to the *Trades House of Glasgow* case. The Railway Companies, which are largely affected, do not rely upon this latter case to the effect of pleading exemption from assessments for manse repairs according to the real rent in parishes where the area of the church has been allocated according to the valued rent.

Questions in regard to alleged allocation.

12. In the case of many old churches the original allocation has been lost. In such circumstances it appears to be a question of fact whether, having regard to the state of recent possession, and the presumptions arising from the history of the parish and the fabric, there ever was an allocation (b). In the Duddingston case it was found that where the valued rent heritors had hitherto enjoyed complete control of the building, they were primarily liable according to the valued rent to the Presbytery for the expense incurred in repairing the church, irrespective altogether of the question of allocation, leaving it to them to work out their relief, if any, against the real rent heritors. The circumstances of the case, however, were very special, and it cannot be relied upon as an authority laying down a rule of general application (c).

SECTION III.—*The rule in Landward-Burghal Parishes.*

Uncertainty in the law in regard to these parishes.

13. As has more than once been pointed out in this volume, much uncertainty prevails as to the state of the law in landward-burghal parishes. This arises from several causes :—(1) Weight is given to the custom of the particular

(a) 1870, 8 M'P. 733, at p. 740.

(b) *Ibid.*

(c) *Ibid.* Cf. report of earlier stage of case, 7 M'P. 875.

parish as modifying general rules. (2) Confusion has arisen between landward-burghal parishes and landward-urban parishes. A landward-burghal parish is a parish in which there is a landward district and a royal burgh, or a burgh of some other denomination, which by custom has in the past arranged its ecclesiastical affairs through its civic authorities. A landward-urban parish is a parish in which there is no such burgh, in which the ordinary heritors enjoy and always have enjoyed the same authority and management of parochial matters as in any ordinary landward parish, but in which, in respect of the growth of an urban element, the valued rent is no longer a fair rule of assessment, and accordingly assessments fall to be levied according to the real rent. Mr. Duncan throughout confuses these two kinds of parishes, and describes the latter as landward-burghal, which they certainly are not. The same confusion is traceable in some of the decisions, as, for example, those of *Creiff* (*a*) and *Peterhead* (*b*), where the feuars or owners of heritage in the urban district are treated as if they were as such an organised body capable of independent action and not simply fellow heritors with those in the rural district. (3) The rule of the real rent where the parish is partly urban, as embodied in the judgment in the *Peterhead* case, does not appear to have at first been generally recognised as applicable in the case of a landward-burghal parish to the effect of requiring one uniform assessment over the whole area of the parish, burghal and rural. Thus in the case of *Lanark* (*c*) the assessment was divided between the landward area and the burgh according to the cess payable by each. In this case, too, it was held that the burghal heritors could not be made directly liable, but only the magistrates, who might have a right of relief against the heritors within burgh. (4) Finally, in several cases

(*a*) *Feuars v. Heritors of Crieff*, 1781, M. 7924.

(*b*) *Harlow v. Merchant Maiden Hospital*, 1802, 4 Paton, 356, not reported in Court of Session.

(*c*) *Lockhart v. Magistrates of Lanark*, 1832, 10 S. 243.

CHAP. XIII.

where the Peterhead rule of assessment was adopted and the burgh heritors were assessed in common with the rural ones, all on their real rents, the Court appear to have ignored the consideration of the question of the bearing of this change upon the position, liabilities, and privileges of magistrates as representing the burghal community. Thus in the case of Elgin (*a*), where the assessment was according to the real rent, the Court laid down that the magistrates were properly cited as heritors, they being the heritors for the burgh. In this case the Presbytery decerned both against the individual heritors in the burgh, each for his particular quota, and also against the magistrates for the *cumulo* sum levied on the whole town, and this decerniture appears not to have been interfered with. The report in the inconclusive Kirkwall (*b*) case is suggestive of much judicial doubt as to how a landward-burghal parish fell to be dealt with. In the case of Annan (*c*) the assessment was laid upon the real rent, but the Court specially reserved the question as to the effect of this upon the position of the magistrates in their ecclesiastical relations.

Rule in regard
to assessments
in landward-
burghal
parishes.

14. It is not, it is thought, longer doubtful that apart from special local arrangement, and excepting always the case where the assessment is for the repair of a church the seats of which have been allocated according to the valued rent, an ecclesiastical assessment in a landward-burghal parish falls to be levied uniformly upon the heritors, without and within burgh, according to the real rents of their properties. It is difficult to see what room, under such an arrangement, there is for any recognition of the magistrates except as heritors in respect of any property of which, as magistrates, they may happen to be the proprietors.

(*a*) Magistrates of Elgin *v.* Gatherer, 1846, 4 D. 25.

(*b*) Baikie *v.* Logie, 1828, 5 S. 546; and 6 S. 748.

(*c*) Downie *v.* M'Lean, 1883, 11 R. 47.

SECTION IV.—*The Act of 1900.*

CHAP. XIII.

15. Several important changes were made by the Ecclesiastical Assessments (Scotland) Act, 1900 (a). Assessments upon the real rent were resented by feuars and other owners of small portions of urban land. These persons, most of whom have acquired their properties comparatively recently, were unfamiliar with ecclesiastical assessments, and it was a special matter of complaint that the assessment fell to be levied not merely upon the value of the land, but also upon the value of the buildings which the feuar himself had erected. Further, in many cases the great majority of the valued rent heritors, who had always been in use to bear the ecclesiastical burdens, were willing to continue to do so without calling upon the feuars, but it was always in the power of one recalcitrant heritor to disturb the arrangement and sow discord in the parish by insisting that the assessment should be imposed upon the real rent. The statute of 1900 was passed with a view to remedy these grievances. It provides:—

(1.) That (section 1) where assessments have been in use to be imposed according to the valued rent, but might competently be imposed according to the real rent, it shall be competent for a majority of two-thirds in value of the valued rent heritors to insist that the old arrangement of assessment according to valued rent shall not be departed from.

(2.) That (section 2) thirty days' public notice shall be given of any resolution to impose an assessment according to the real rent. The object of this provision is to allow an opportunity to those interested in avoiding friction in the parish to consider the matter, and, if they think proper, to make an arrangement to relieve the smaller heritors. Formerly it sometimes happened that whilst the congregation would gladly have provided the funds to relieve these persons, the assessment was imposed and levied without any opportunity being afforded them of making any proposal.

(3.) (Section 3 (1).) No part of any ecclesiastical assessment is to be imposed upon the church, or minister's dwelling-house,

(a) 63 and 64 Vict. c. 20. See Appendix, p. 676.

CHAP. XIII.

or buildings, or lands accessory to either, such as mission halls, garden, or glebe of any religious denomination.

(4.) (Section 3 (2).) In the case of all ecclesiastical assessments, according to the real rent, a deduction of £50 is to be made from the rent of each heritor wherever the amount of the deficiency created in the total amount of the assessment by allowing such deduction has been provided by the kirk-session.

Object of the deduction allowed.

16. The object and effect of this last provision is to wipe out the small feuor altogether. As his rent is generally under £50, he and his grievance disappear together. In order that the burden upon the other heritors may not be increased, provision is made that this deduction and consequent exemption is to be allowed only where the deficiency is made up otherwise. Further, as it would manifestly be regarded as a hardship by the man whose annual value is slightly over £50 that he should have to pay upon the whole of it, whilst his neighbour who was just under £50 was exempt altogether, it has been provided that the deduction shall be of universal application. Heritors who in virtue of these provisions are exempt from assessment are not entitled to take part in the discussion, or to vote upon any question in regard to the works or expenditure (section 3).

SECTION V.—*Assessments where Lands disjoined quoad sacra.*

Lands disjoined and annexed to another parish.

17. The question of liability for assessments in the case of lands which have been disjoined *quoad sacra* from one parish, and either annexed to another or erected into a new parish *quoad sacra*, has given rise to much difference of opinion. In the case of the older disjunctions and annexations the law was understood to be that the heritors in the disjoined lands were not liable for the repair of the manse of the new parish (a), but that they were liable for the repair and upholding of the church (b); being bound as regards the

(a) Park v. Maxwell, 1748, M. 8503; Elchies, voce Manse, No. 3; Bankton, ii. 3, 80; Ersk. ii. 10, 64.

(b) Drummond v. Heritors of

Monzie, 1773, M. 7920; Scottish North-Eastern Railway Company v. Gardiner, 1864, 2 M'P. 537.

manse, but released as regards the church, from the correlative burden in the original parish. Lord Deas, however, has endeavoured to explain the Monzie case, which is the authority for the proposition as regards churches, as having turned upon specialties, long practice of attending the church, and previous intermeddling with the fabric (*a*). The question is of little practical importance, as in the case of all old disjunctions and annexations *quoad sacra* the matter must be now regulated by use, whilst, should there be any future ones, care will probably be taken to provide for the matter in the decree.

18. The question of the liability of heritors in a modern parish *quoad sacra* for ecclesiastical assessments in their old parish is of much greater practical importance. The matter was considered by a number of the Judges in the Jedburgh case (*b*), but that case was ultimately disposed of upon specialties. In the Rosemarkie (*c*) case the matter was considered by Lord Curriehill, whose judgment upon the point was acquiesced in, and it was held that the heritors in the parish *quoad sacra* remained liable for all the ecclesiastical burdens of the old parish. This, it is thought, is sound law, and is so generally regarded (*d*). In the Roxburgh case (*supra*) an opinion was indicated by Lord Deas that the heritors of the parish *quoad sacra* are entitled to have sittings allocated to them in the church of the old parish in respect of their lands situated within the parish *quoad sacra*. It is thought, however, that this is contrary to principle. They have no need of such accommodation. The inhabitants of the *quoad sacra* parish are enjoined and required to resort to the church of the *quoad sacra* parish; it is their parish church, and the minister of the old area would be com-

Lands dis-
joined and
erected into a
parish *quoad
sacra*.

(*a*) Per Lord Deas in Roxburgh *v. Millar*, 3 R. at p. 741.

(*b*) Roxburgh, 1876, 3 R. 728; reversed 1877, 4 R. (H.L.) 76. See also Abercorn *v. Presbytery of Edinburgh*, 1870, 8 M.P. 733.

(*c*) Magistrates of Fortrose *v. M'Lennan*, 1880, 8 R. 124.

(*d*) See Aitken *v. Waddell*, 1889, 5 Sheriff-Court Rep. 262, and Aitken *v. Thomson*, *ibid.* p. 300.

CHAP. XIII.

mitting a breach of the law if, without the sanction of the minister of the parish *quoad sacra*, he entered that parish for the performance of any parochial duty.

SECTION VI.—*Imposing and levying the Assessment.*

Imposing
assessment.

19. The assessment for defraying the cost of the operations which the heritors have by their resolution decided to execute is usually imposed by this body, and is frequently embraced in such resolution. Power to impose the requisite stent may be, and sometimes is, conferred on the committee. When, as frequently happens, the actual cost of the work exceeds its estimated cost, renewed assessments require to be and are imposed.

Appointment
of "collector."

20. For the ingathering of the assessment a "collector" is appointed, either by the body of heritors or by their committee, whose duty is to apportion on the several heritors the amount due by them respectively according to the appropriate rate of assessment; and to receive payment from them of their respective proportions when due—which may be either on the final completion of the work to be executed, or at different stages of its progress, and by way of instalments, as conditioned in the contract. The collector ought to demand payment of the shares of assessment imposed on each heritor as they fall due, and do all in his power to prevent the accumulation of arrears. If a heritor refuse, or unduly delay payment of his quota, the collector ought to report the matter to the heritors, or to their committee (according as his appointment emanates from either body), for their instructions (a). When from the remissness of the collector there is a deficiency of funds to meet the contract price due, and, in consequence, the committee are under obligation therefor,

(a) In *Shaw v. Forbes*, 1827, 5 S. 761, affd. 4 W. & S. 300, there were two successive committees. The first committee was appointed by the

Court of Session, and on the expiry of its powers, the second was appointed by the body of heritors.

the body of heritors will be entitled to impose an assessment for the relief of the committee (*a*), although this in effect amounts to a second assessment in respect of the same matter, and subjects certain of the heritors in payment to an extent beyond the original and proper limits of their respective liabilities (*b*).

21. In addition to the rights at common law possessed by the heritors of a parish, as a *quasi*-corporation, to impose and levy assessments for parochial purposes, as above explained, special statutory powers in the matter have been conferred on them. By the 25 and 26 Vict. c. 58, as amended and explained by the 29 and 30 Vict. c. 75, the heritors of a parish may resolve to raise the money required to defray the expense of the erection, improvement, enlargement, purchase, or acquisition of any of the following parochial buildings, by annual assessments extending over a period not exceeding ten years. These buildings embrace churches, churchyards and their walls, and manses. Such assessments are to be imposed, levied, and recovered in the same manner, and with the same liabilities and rights of relief as formerly.

22. On the adoption of a resolution to the above effect by a meeting of heritors they are authorised to borrow the

Statutory powers to impose assessment for expense of parochial buildings.

Power to borrow on security of assessment.

(*a*) See *Shaw v. Forbes*, *supra*, and *Boswell v. Duke of Portland*, 1834, 13 S. 148.

(*b*) See *Shaw v. Forbes*, *supra*. Here the collector, who was appointed by a committee of the heritors, having failed to enforce payment of the shares of several heritors, a deficiency of funds arose. In consequence of this, the committee, on the termination of the work, were obliged to grant two bills to the builders, both of which were discounted, and subsequently renewed by a bill for £802:11:1. After repeated renewals of this bill, a balance of £416 remained, consisting principally of accumulated interest and the expense of renewals, for which the committee granted a bill for £619:8:1. At a general meeting of heritors, it was resolved

to assess themselves for the amount of the balance of this bill due by the committee, viz., £416:4:8. The trustees of a deceased heritor, who left a minor son, were sued by the committee for payment of £119, as the share due by him. In defence it was pleaded that, as his father had paid the proportion of the contract price of the church, he was not liable for any arrears which had been improperly allowed to accumulate by the default of the collector. The House of Lords, however, affirming the judgment of the Court of Session, repelled this plea, and decreed against the defenders. See per Lords Balgray and Gillies, 5 S. 763, as to the liability of each individual heritor.

CHAP. XIII.

required amount on the security of the annual assessments, which may be assigned to the lender in security and for repayment by a bond and assignation, signed by two heritors duly authorised to do so. When there is only one heritor in the parish, he may, on application to the Sheriff of the county obtain authority from him to raise the sum required by prospective assessments, borrow the same, and grant security for its repayment in the way just stated.

Application to
Sheriff in case
of one heritor.

CHAPTER XIV.

ON PRESBYTERIAL JURISDICTION.

SECTION I.—*Origin and Constitution of Presbyteries.*

CHAP. XIV.

1. By the Act 1592, c. 116, the present ecclesiastical constitution of the Established Church of Scotland—the liberty of which, under the title of the “trew and haly kirk,” had been already ratified by the Acts 1579, c. 68, and 1581, c. 99—was formally sanctioned; and the special jurisdiction of general assemblies, synodical or provincial assemblies, presbyteries, and kirk-sessions was shortly pointed out.

2. A Presbytery is composed of the parochial clergyman (or, in the case of a collegiate charge, the parochial clergymen), and one lay elder selected from the kirk-session, of each parish (*a*) situated within a determinate district—technically styled the bounds of the Presbytery. The bounds of Presbyteries may be altered and Presbyteries may be amalgamated or divided by the General Assembly. The number of parishes of which different Presbyteries consist varies greatly in different instances (*b*). Each Presbytery holds regular meetings at stated times, which are presided over by its moderator, who, as matter of practice, generally retains office for a period of six months after his election. To superintend the management of its business and proceedings generally, and, in particular, to keep minutes of its meetings, a clerk of Presby-

Presbyteries,
how composed.

Their meetings
and officers.

(*a*) These lay elders are chosen by their respective kirk-session. They do “not come into the Presbytery *“virtute officii,”* but by election, and “have no other connection with the “Presbytery.” See per Lord Justice-Clerk Hope in *Buist v. Taylor*, 1856, 18 D. 596, where the reader will find, pp. 602–4, a valuable statement by

his Lordship touching the constitution of Presbyteries, and the powers and duties of their members, clerical and lay respectively.

(*b*) Thus the number of parishes of which the Presbytery of Glasgow is composed is ninety-three, while the Presbytery of Burra-voe, in Shetland, embraces only five parishes.

CHAP. XIV.

tery is appointed, and the Presbytery may also appoint an officer to carry its orders into execution.

“The Pres-
“bytery,”
quid?

3. In the disposal of all matters of business, the plurality of members voting on the motion determines what the resolution of the Presbytery is. Hence, as regards any particular measure or course of action, the majority of its members constitute, and are entitled to assume, the denomination of “the Presbytery” (*a*). In the joint action of the body, each of its members undertakes and bears an individual and independent responsibility. Consequent upon this, and the circumstance that, from the mode of its constitution, the identity of the body is constantly varying, it is required that in all legal proceedings at the instance of “the Presbytery,”—whether consisting of the majority or of the entire number of the body,—the names of all the individuals so suing as the Presbytery should be set forth (*b*).

How cited.

4. The correct form in which to cite the Presbytery to any legal proceeding is to call as defenders or respondents thereto, or direct the writ against—1st, the Presbytery as a body; 2^d, its moderator; and 3^d, the individual members composing the Presbytery (including the moderator *qua* member). In the case of an ordinary summons it is usually served in the usual way on the moderator of the Presbytery for the time being, for himself and as representing the Presbytery; and on the other members of Presbytery individually. On the other hand, in the case of a suspension and interdict, it would appear that less formality of procedure is required. Service or intimation may in this case be competently

Service of
summons.

Service of a
suspension.

(*a*) “Then if a minority insist upon libelling a minister in any circumstances, however strong—say after conviction in the criminal court—they are not entitled, even in such a grave case of discipline, to assume the name of the Presbytery, because they are not a majority.”—Per Lord Justice-Clerk Hope in *Buist v. Taylor, supra*.

(*b*) “The majority, of course, are entitled to assume the denomination of the Presbytery, but (what is very material) must also state their individual names as pursuers or defenders.”—Per Lord Justice-Clerk Hope, *ibid*.

made on the Presbytery through its moderator alone, or probably through the clerk (a). CHAP. XIV.

SECTION II.—*Parochial Status of Ministers and Elders composing a Presbytery.*

5. In the case of Store (b) the question was mooted whether the ministers of parliamentary districts under 5 Geo. IV. c. 90, which bore to have been erected into parishes *quoad sacra* by virtue of the General Assembly's Act of 25th May 1833, possessed the powers and privileges of parish ministers. The judgment there pronounced appears to be rested on grounds which did not necessarily involve the decision of the point referred to. Doubts, however, having been expressed both as to the soundness of this judgment and of the *rationes decidendi*, the question was again raised in an action of a similar description, where it was decided—*quoad* a right or obligation to contribute toward the Ministers' Widows Fund—that the ministers of such parliamentary districts bearing to be so erected into parishes *quoad sacra* did not possess the *status* of parochial ministers (c). Minister of a parliamentary church not a parish minister.

6. The same point of law as affecting the constitution of Presbyteries was raised by way of suspension and interdict in the case of Cambusnethan (d), where, on account of the magnitude of the question, the Court refused to grant interim interdict in the absence of a contradictor, but ordered the note to be intimated and answered. In the case of Stranraer (e), where the parish minister had been served with a libel at the instance of the Presbytery, interdict was granted in absence against their proceedings in respect that one of their number was merely a *quoad sacra* minister under the General Case of Cambusnethan.

(a) See *Clark v. Stirling*, 1839, 1 D. 955, where various objections were stated to the mode in which certain suspensions and interdicts were served on the Presbytery of Dunkeld.—See per Lord Moncreiff, p. 996 *et seq.*

(b) *Gordon v. Trustees of Ministers'*

Widows Fund, 1836, 14 S. 509, and 1836, 15 S. 15.

(c) *Irvine v. Trustees of Ministers' Widows Fund*, 1838, 16 S. 1024.

(d) *Livingstone*, 1841, 3 D. 1278.

(e) *Wilson v. Presbytery of Stranraer*, 1842 4 D. 1294.

CHAP. XIV.

Case of Abertarff.

Assembly's Act, and therefore not a member of the Presbytery. To a like effect is the case of Abertarff (*a*), where interdict was granted *de plano* against similar proceedings by the Presbytery, on the ground that one of its members was the minister of a parliamentary church merely. One of the Judges, however, here remarked that he did "not wish to hold it as a " matter of course that interim interdict should be granted " against the proceedings of a Presbytery whenever it is " alleged to contain a *quoad sacra* minister" (*b*).

Stewarton.

7. The question of law referred to in these decisions was very fully argued and considered in the Stewarton case (*c*). Here the Presbytery of Irvine admitted a dissenting pastor, Mr. Clelland, as a minister of the Established Church, in terms of an Act of Assembly, and thereafter adopted proceedings with a view to allocate to the church of which he was appointed minister a parochial district *quoad sacra*. Against these proceedings the patron of the parish and others presented a suspension and interdict in which they prayed the Court, *inter alia*, to prohibit the minister from "sitting, " acting, and voting as a member of the Presbytery." Interim interdict was granted as craved on 15th June 1840, and again on 17th March 1841, on the occasion of Mr. Clelland having demitted his charge, when a call was moderated in, in favour of a Mr. Latta as his successor. A record having thereafter been made up in the process of suspension and interdict, the whole Court, by a majority of eight to five, suspended the proceedings complained of, and declared the interdicts, as already granted, perpetual (*d*).

Doctrine
established by
preceding
cases.

8. The foregoing cases establish the doctrine that when a minister claiming to act, or acting, as a member of Presbytery does not possess the *status* of a parochial minister, he is

(*a*) Smith *v.* Presbytery of Abertarff, 1842, 4 D. 1476.

(*b*) Per Lord Mackenzie, *ibid.* p. 1477.

(*c*) Cuninghame *v.* Presbytery of

Irvine, 1843, 5 D. 427. A separate and fuller report of this case was published by the Reporters.

(*d*) This decision was the proximate cause of the Disruption in 1843.

disqualified from forming an integral part of this body. When, therefore, the resolution adopted by a Presbytery so composed is due to or has been affected by (a) the vote of a person, or of persons so disqualified, any party or parties whose interests are thereby prejudicially affected (b) may successfully object thereto, and obtain redress against the same, in competent form.

9. It is to be observed, however, that the doctrine of "holden and reputed," or of *bona fides*, applies with peculiar force to cases of the kind now alluded to. On the application of this principle, the decision in the (third) case of Cambusnethan (c) in part proceeded. Here, where a suspension and a reduction had been raised in respect of the part taken by chapel ministers in the disposal of a case of discipline, the Court unanimously repelled the reasons of suspension, and in the reduction found "the action incompetent and irrelevant." The main grounds on which this judgment was rested seem to be—1st, and chiefly, that all the members of the Presbytery who were ministers of chapels of ease were acting *bona fide* as members of the Court, under a colourable title conferred on them by the General Assembly's Act of 1834, which had, without dispute, been recognised for a number of years as a valid and operative law of the Church; 2nd, that Livingstone had, by pleading to the relevancy of the libel, and defending himself against the charge contained in it, without stating

Doctrine of
bona fides.

Case of Cam-
busnethan.

Grounds of
judgment.

(a) If their votes are inoperative, *i.e.* if the result arrived at would be the same as it is—these votes being disregarded—the fact of their having been given will not invalidate the proceedings.—See *post*, paragraph 9, at end.

(b) Accordingly, in *Campbell v. Presbytery of Kintyre*, 1843, 5 D. 657, the Court refused to suspend proceedings taken by the respondents after a remit to them from the General Assembly, and objected to in respect that this body was partly composed of *quoad sacra* ministers, on the

ground, *inter alia*, that this remit had really no operative effect at all, and merely left the Presbytery free to act as before, and as—without such remit—they could have done on the lapse of the appeals which had been abandoned.

(c) *Livingstone v. Presbytery of Hamilton*, 1846, 8 D. 898; *affd.* 6 Bell, 469. The first case of Cambusnethan is that of *Livingstone*, 1841, 3 D. 1278, already referred to; the second is that of *Livingstone v. Clason*, 1845, 7 D. 554, which does not bear on the subject under review.

CHAP. XIV.

any objection to its competency or to the constitution of the Presbytery, practically admitted its jurisdiction, or at least was, *personali exceptione*, barred from afterwards disputing it; and 3d, that as the judgment of the Presbytery was a unanimous judgment, the votes of the members of Presbytery which were objected to, even if invalid, were *de facto* inoperative, and did not affect the result at which the members of the Presbytery, *nemine contradicente*, had arrived.

Effect of 7 and
8 Vict. c. 44.

10. The inconveniences attendant on the state of the law, above explained, have been to a great extent practically removed by the 7 and 8 Vict. c. 44. By this statute it is specially provided in regard to—1st, districts erected into parishes *quoad sacra* in connection with churches built and endowed, or which have been undertaken to be built and endowed under section 8; 2nd, separate churches built for Gaelic congregations and permanently endowed which are erected into separate parishes under section 13; and 3rd, parliamentary districts under 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, disjoined and erected into parishes *quoad sacra* under section 14 of 7 and 8 Vict. c. 44—that it shall be lawful for the ministers and elders of such districts and separate parishes respectively to enjoy the *status* and all the powers, rights, and privileges of parish ministers and elders of the Church of Scotland.

SECTION III.—*Jurisdiction of Presbyteries.*

Spiritual and
secular.

11. In virtue of the provisions of the Act 1592, c. 116, and the principles of common law, Presbyteries are invested with a certain secular as well as with a spiritual jurisdiction. The jurisdiction and powers in reference to matters spiritual—*e.g.*, the government and discipline of the clergy and eldership, and the observance by them of the law and practice of the Church—do not fall within the scope of this treatise.

12. Besides such jurisdiction, however, Presbyteries possess certain and important rights of superintendence or

control over or in connection with the patrimonial rights of the Church, and the parochial buildings or property belonging to or destined for its use. This right belongs to them as bodies which by their constitution, in accordance with immemorial practice, are entitled and bound to guard the rights of the Church, civil or ecclesiastical, within their respective bounds. In virtue of this their position, it becomes, in certain circumstances, their duty—(1) to enforce the application of funds destined to the sustentation of the Established clergy; (2) to protect parochial ecclesiastical buildings and property against improper use, and to vindicate possession of them on behalf of the Church; and (3) to require that they be kept in a proper and sufficient condition, and, if necessary, that they be repaired or renewed, or, if non-existing, that they be provided.

CHAP. XIV.
Guardians of
Church pro-
perty and
rights.

SECTION IV.—*Vindication of Church Property.*

13. In their character of guardians of the rights and interests, civil and ecclesiastical, of the Church within their respective bounds, Presbyteries have a good title to insist in actions brought for the purpose of vindicating, on behalf of the Established clergy, the acquisition or application of funds destined for their sustentation. This doctrine is well illustrated by a case (*a*), in which the Presbytery of Dundee brought an action of declarator against the magistrates, as trustees of property granted in trust by Queen Mary in 1567 for certain specified purposes, to have it found that one of these purposes was the sustentation of the Established clergy within that burgh, and to have the magistrates decreed to provide out of the revenues of such property adequate stipends to its ministers. In defence to this action the magistrates pleaded, *inter alia*, that the pursuers had no title to sue. This plea, however,—which was ultimately not insisted in,—

Bequests to
the Church.

(*a*) Presbytery *v.* Magistrates of Dundee, 1858, 20 D. 849; *affd.* 4 Macq. 228.

was without hesitation repelled, and the doctrine, as above stated was authoritatively laid down (*a*).

Buildings
belonging to
the Church.

14. On a similar principle, the Presbytery is entitled to adopt legal proceedings for the purpose of preventing the alienation from the Established Church, and the use by a minister and congregation who have seceded from it, of a church or chapel which *de facto* belonged, or, in terms of the deed of constitution, was to exist in connection with the Established Church (*b*). On a similar principle, Presbyteries are entitled to vindicate the possession of buildings destined for use as places of Divine worship in connection with the Established Church, although for a long period of years they have been *de facto* used as places of worship by a body of dissenters from the Church (*c*). While Presbyteries, however, may and ought to protect the patrimonial and proprietary rights of the Church, they are not the guardians of its non-territorial privileges. On this principle it was decided that the Presbytery of Edinburgh had no title to apply for interdict against the patrons of the University electing to a vacant professorship a person alleged by them to be disqualified for the office, by reason of his being a member of a body which had separated from the communion of the Church and disowned its authority (*d*).

Limitation of
their powers as
guardians.

SECTION V.—*Presbyterial Jurisdiction quoad Parochial Ecclesiastical Buildings and Property.*

15. Besides being entitled to vindicate the application,

(*a*) See per Lord Justice-Clerk Hope, *ibid.* p. 874.

(*b*) Presbytery of Edinburgh *v.* Trustees of Lady Glenorchy's Chapel, 1846, 18 Jur. 305. It may be observed that in this case the provisions of the Act obtained by the trustees were such as directly put the chapel under the superintendence of the Presbytery, and that on this speciality the Court's judgment was to a great extent rested. But the doctrine

stated in the text was held to be undoubted in Presbytery of Fordyce *v.* Shanks, 1849, 11 D. 1361, and there per Lords Mackenzie, Fullerton, and Jeffrey. See also per Lord President Inglis (then Lord Justice-Clerk) in *M'Dougall v. Blackie*, 1863, 1 M.P. at p. 508, end of opinion.

(*c*) Presbytery of Edinburgh *v.* De la Condamine, 1868, 7 M.P. 213.

(*d*) Presbytery *v.* Magistrates of Edinburgh, 1847, 10 D. 247.

possession, or use of Church patrimony or property, as above referred to, Presbyteries possess a peculiar and important right of jurisdiction or control over the body of heritors in each parish within their respective bounds, and even, in certain circumstances, an independent right of self-action in the matter of providing and maintaining church, manse, glebe, and churchyard accommodation throughout the country. These rights and duties have already been in large measure explained in the chapters dealing with the respective subject-matters.

16. The statute 1572, c. 54, *inter alia*, provided that when the heritors, after requirement to this effect, neglected to appoint stentmasters to raise the money for the repair and upholding of churches, "the archbishop, bishop, superintendent, or commissioners of the kirkes," should do so themselves (*a*). Although somewhat meagrely expressed, the import of this provision was to empower these persons, in the alternative stated, to impose an assessment on the heritors to be applied toward the building or repair of a particular church, and thus inferentially to confer on them a certain jurisdiction over the heritors in the matter.

17. As this statute was passed during a period when a Prelatic form of Church government was recognised by the State, the jurisdiction in question was conferred on members of the Episcopal order. No Act was subsequently passed either during the periods when Episcopacy was temporarily suppressed, or after it was finally abolished, expressly transferring to, or conferring on Presbyteries the jurisdiction in question, and to no other statute than that just cited can the possession by Presbyteries of the jurisdiction, which is recognised as belonging to them, in the matter of providing church accommodation, be ascribed.

18. The Acts of Parliament which created in favour of the Reformed clergy a right to manses and glebes, including

CHAP. XIV.

Providing and maintaining churches, &c.

Origin of such jurisdiction.
1572, c. 54.

Episcopal jurisdiction.

Not expressly conferred on Presbyteries.

(a) See *supra*, p. 105.

Acts as to manses and glebes.

CHAP. XIV.

Designation
committed to
bishops.

To Pres-
byteries by
1644, c. 31.

Acts 1644, c.
31, and 1649,
c. 45,
rescinded.

Provisions of
1663, c. 21.

under his latter term minister's grass, and which subsequently imposed on the heritors the statutory burden of providing and maintaining such accommodation for parish ministers, have already been fully explained (*a*). The Act of 1572, c. 48—passed during the existence of Episcopacy—provided that the parson's or vicar's manse should belong to the minister or reader at the kirk, with four acres of glebe land, and that failing this quantity, so much as existed was "to be marked and speciallie designed be the archbishop, "bishop, superintendent, or commissioner of the diocese or "province, the time of their next visitation, be the advice of "ony twa of the most honest and godlie of the parochiners." The Act 1644, c. 31—passed during the temporary suppression of Episcopacy, and the existence of the rival form of Church government—specially confers power on and directs Presbyteries "to design manses and glebes to ministers at every "parish church within their several bounds," where such have not been at all designed, or to the full quantity, and also "when manses and glebes are decayed or become "unprofitable" from any of the causes therein referred to; and the Act further ordains letters of diligence to pass upon such designations in the same way as they passed upon those of bishops, &c., or others having power to design.

19. This Act, and also that of 1649, c. 45, were rescinded by 1661, cc. 9 and 15, the effect of which was to re-enact or revive the provisions of, *inter alia*, those of 1572, c. 48; 1593, c. 165; and 1606, c. 7. So stood the law on the subject when the Act 1663, c. 21, was passed during the existence of Episcopacy. On the narrative (1) that some ministers had not been sufficiently provided with manses and glebes; and (2) that some did not get the same free at their entry, the heritors were, on the former alternative, ordained to build competent manses "at the sight of the bishop of the diocese, or such "ministers as he shall appoint, with two or three of the most

(*a*) *Supra*, opening paragraphs of CHAPTERS IX., X. and XI.

“discreet men of the parish.” After certain clauses relative to glebes and minister’s grass, the declaration occurs that “this present Act *as to the manses* is to have force, as the “same had been made and dated 14th March 1649,” being the date of the Act 1649, c. 45.

20. Neither of the old statutes 1563, c. 76, nor 1597, c. 232, which impose on heritors the obligation of maintaining and repairing churchyard dykes, makes any allusion to the interference or consent either of bishops or Presbyteries in enforcing this obligation, or that of providing ground for burial purposes, by designation or otherwise. Indeed, neither statute contains any express allusion to the latter obligation at all.

21. It thus appears—(1) that no jurisdiction has been specially conferred on Presbyteries in regard either to providing or maintaining church or churchyard accommodation; and (2) that while the right of designating manses and glebes to the Reformed clergy was conferred on Presbyteries by the Act 1644, c. 31, this right was abolished by the Rescissory Act and was not again specially conferred on them. On the other hand, it appears that a certain power of enforcing the building and maintenance by the heritors of churches and manses, and of designating glebes for the Reformed clergy, was expressly conferred on bishops. In this position of the law on the subject Presbyteries have, since the final abolition of Episcopacy, *de facto* exercised the right of ordaining heritors, when necessary, to provide and maintain suitable church, churchyard, glebe, and manse accommodation, and have also exercised the right of designation of ground.

22. In vindication of the exercise by Presbyteries of these assumed rights, two theories have been advanced. On the one hand, it has been said that as a natural and legitimate result of the abolition of Episcopacy and the establishment of Presbyterianism, it followed that Presbyteries, as coming in place of bishops, were vested with the jurisdiction *quoad*

CHAP. XIV.

Import of the enactments.

Jurisdiction exercised by Presbyteries.

Theories on the subject.

CHAP. XIV.

the parochial ecclesiastical subjects in question, which had been expressly conferred on and was formerly exercised by bishops. On the other hand, the view has been expressed that although the Acts 1644, c. 31, and 1649, c. 45, were formally rescinded, they were intended to be, and were constructively, revived or re-enacted by the statute 1663, c. 21—especially having in view its concluding clause—and that thereby the jurisdiction in question was conferred on Presbyteries.

Respective
merits of
theories.

23. Of these theories, both of which are supported by high authority (*a*), it may be remarked that the former appears the more satisfactory, both because it embraces within its scope churches which the latter does not, and also because the Act 1663, c. 21, specially commits to the bishop of the diocese or his nominee the duty of enforcing performance of the matters thereby enjoined, which seems impliedly to exclude from the scope of its re-enacting provisions the appointment of Presbyteries to the discharge of this duty.

Their practical
result the
same.

Both theories, however, lead to the same result, viz. the recognition of the right of jurisdiction in question as being vested in Presbyteries. Whichever theory be preferred as most satisfactorily accounting for the acquisition of this right by these Church courts, the fact remains that they have, ever since the final abolition of Episcopacy in 1689, uninterruptedly and without successful challenge exercised the right in question (*b*).

SECTION VI.—*Extent and nature of the right of Presbyterial Jurisdiction.*

Its scope two-
fold.

24. The jurisdiction so possessed by Presbyteries includes, on the one hand, a right to designate or appropriate suitable

(*a*) The former theory appears to be that adopted by Ersk. ii. 10, 56, and by Lord Justice-Clerk Boyle and Lord Glenlee in *Magistrates of Ayr v. Auld*, 1825, 4 S. at p. 100; and the latter, that adopted by Lords Robert-

son, Pitmilley, and Cringletie, in the same case, p. 101. See also *per curiam* in Dunbar, 29th June 1804, F.C., and *M. Jurisdiction*, Appx. 11.

(*b*) See p. 116.

buildings or ground to an ecclesiastical or *quasi*-ecclesiastical use, and on the other, a right of superintendence over buildings or property appropriated to such use, to the effect of requiring that the same be maintained in a sufficient and becoming condition. The subjects which fall within the exercise of these rights are churches, manses, glebes, minister's grass, and churchyards.

25. Designation is the process whereby secular property is appropriated for occupancy as the site of a church, or as a manse, glebe, or minister's grass, or dedicated as a place of burial for the accommodation after death of the inhabitants; and the effect of a decree of designation by the Presbytery is to sequester the subject to which it applies from the uses of ordinary property—to impress upon it an ecclesiastical or *quasi*-ecclesiastical character; and, so long as it retains this character, to confine the legitimate use of the subject to purposes which are germane to those for which it was appropriated or dedicated. Designation, *quid?*

26. The old Acts of Parliament which require the heritors to *provide* manses and glebes assume, as an existing condition of matters, a parish supplied with a church, but destitute of manse or glebe. Hence, in such circumstances, the Legislature directed that manses and glebes were to be *provided* for the use of the incumbent, the mode of doing so being by designation by the Presbytery. This provision is still applicable to a parish so circumstanced; and under their right either of designation or of superintendence, as now mentioned, or as the combined result of both rights, it devolves on the Presbytery to see that a sufficient manse, or glebe, or right of pasturage *qua* minister's grass, as may be required, is provided for the use of the benefice. Designation of manse and glebe.

27. On the other hand, providing a church for the first time, or as it is technically termed, "planting" a church, is synonymous with or is an accessory of the erection of a new parish or parochial charge, authority to create which was Duty devolving on Presbytery.

CHAP. XIV.

committed by the Legislature, not to Presbyteries but originally to Parliamentary Commissioners, and is now vested in the Judges of the Teind Court. Hence the term designation, which, as applied to a building, implies an original act of construction, is not used in connection with churches. The Presbytery's right of interference *quoad* these buildings is practically confined to that of designating ground for the site of a church which is to be rebuilt in a different situation, or to be enlarged so as to encroach upon private property, and of superintending its sufficiency in point of repair and accommodation, after it has, by decree of the Teind Court, or as a condition of the erection of the parish, been built.

Designation of churchyards.

28. Although churchyards are not mentioned in the statutes under which Presbyteries, as coming in place of bishops, have assumed the right of designating or the right of superintending Church property, they have long exercised, and are now regarded as possessed of, both rights in reference (1) to the allocation of ground for parochial burying purposes; and (2) the erection and subsequent maintenance of walls as enclosures around churchyards (*a*).

SECTION VII.—*Designation of a Manse.*

Course of procedure.

29. As coming in place of the bishops, who during the existence of Episcopacy as the established form of Church government exercised similar functions (*b*), Presbyteries possess primary jurisdiction in the designation of manses and glebes. Accordingly, when a minister who has not a manse (being entitled thereto) desires to obtain one, he may apply to the heritors in the first instance to build him a

(*a*) *Walker v. Presbytery of Arbroath*, 1876, 3 R. 498; *affd.* 4 R. (H.L.) 1. Churchyards are regarded as necessary adjuncts of parish churches, and as governed by the same principles of law. See per Lord Ordinary Cringletie in *Ure v. Ramsay*, 1828, 6 S. 916, per Lord Ordinary Medwyn in *Heritors of South Leith v. Scott*, 1832,

11 S. at p. 78; and *Town of Greenock v. Stewart*, 1777, M. 8019, and *Kirk-Yard*, Appx. 1, rev. 2 Paton, 846.

(*b*) See *M'Jorie v. Heritors of Caerlaverock*, 1671, M. 8498; and *Gibson v. Hepburne*, 1673, 1 Br. Supp. 699; also *Minister v. Parishioners of Cockburnspath*, 1668, 2 Br. Supp. 141, *supra*, para. 22.

manse, and thereafter he may get the house when erected, along with the legal amount of manse ground, inspected by the Presbytery, and, on approval, declared by that body to be the manse attached to the cure, or he may apply directly to the Presbytery to provide him with a suitable manse in terms of law. The process by which this is accomplished is technically termed a designation.

30. On the receipt of the minister's application, which is usually in the form of a petition, the Presbytery are in use to appoint a day on which, either by themselves as a body or by a committee of their number, to make a "visitation" or inspection of ground to be selected as a site for the manse. Notice of the day, hour, and place of meeting is communicated to the minister, who is generally directed by the Presbytery to make oral or edictal intimation thereof on the following Sunday, at the morning diet of public worship before dismissal of the congregation, for the information of the heritors (*a*). In addition to this, circular letters notifying the visitation are sometimes directed to be sent to non-resident heritors, or to their known factors or agents (*b*). The *induciae* of the diet of visitation vary, but it is not often called on a shorter period of notice than six or eight days from the date of intimation or "edict," as it is sometimes termed, from the pulpit or precentor's desk. When due citation of all the heritors is made at the outset of the process of designation, the subsequent death or absence of any of them does not operate as a sist of the proceedings, or interfere with the operative effect of the Presbytery's deliverances, *quoad* the body of heritors generally (*c*).

Visitation by
Presbytery.

Intimation of
diet.

Induciae.

(*a*) Intimation was made by "edict" from the pulpit, as above mentioned, in *Steel v. His Parishioners*, 1712, M. 5131, 8498; and *Magistrates of Elgin v. Gatherer*, 1841, 4 D. 25, and *Walker v. Presbytery of Arbroath*, 1876, 3 R. 498, 4 R. (H.L.) 1.

(*b*) *Potter v. Heritors of Kippen*,

1708, 4 Br. Supp. 691; also *Musket v. Duke of Buccleuch*, 1668, M. 5135, where intimation from the pulpit, or at the church door, seems to have been treated as sufficient.

(*c*) See *Steel v. His Parishioners*, *supra*, M. 5131, 4to, and 8498, 4to.

CHAP. XIV.

Men of skill.

31. The Presbytery make an appointment of qualified men of skill to assist them in the process of designation, which includes the selection of appropriate ground as the site of the manse, and offices, and garden, and the ascertainment of the cost of the buildings and other matters of detail connected with their construction. According to the case of *Lochmaben (a)*, these men of skill required to be other than and in addition to the two or three of the most discreet men of the parish, mentioned in the statute 1663, c. 21, but, as Connell remarks, the use of summoning "discreet men of the parish" is now obsolete, the attendance of skilled tradesmen being deemed sufficient (*b*).

Minister's demand considered.

32. On the visitation, the meeting being duly constituted, the minister's demand for a manse is formally brought under consideration, and he and the heritors, for their respective interests, are heard if necessary thereupon. The men of skill nominated by the Presbytery, who may be put upon oath (*c*), are sometimes examined orally in reference to the proposed site of the manse, the estimated expense of its erection and relative details. A written report on these

Report by men of skill.

matters, with a relative plan of the buildings and an estimate of the cost of erection, is afterwards prepared by them and submitted to the Presbytery, who, on considering it, and being satisfied with the justness of the minister's claim, make a selection of ground in convenient proximity to the church (*d*), and issue a deliverance appointing it as the site of the manse, offices, and garden; ordain the heritors forthwith to build a manse, conform to certain plans which have been approved

Presbytery's deliverance.

(*a*) *Steel v. His Parishioners*, *supra*, M. 5131, 1mo, and 8498, 1mo. See also *Hamilton v. Athlinton*, 1628, M. 5134.

(*b*) Connell Par. p. 253, foot.

(*c*) The Act 31 and 32 Vict. c. 72, has not abolished such oaths, as they are oaths administered in accordance with custom to persons of skill in the character of witnesses, and as such to come within the saving clause of the Act, s. 14, head 12.

(*d*) *Steel v. His Parishioners*, *supra*, M. 5131 and 8498. The tendency of Lord Cuninghame's remarks in *Campbell v. Morgan*, 1850, 12 D. at p. 1265, seems to imply that in the designation of ground for a manse (or glebe), the Presbytery is to avoid, as far as possible, encroachment on the privacy of landed proprietors.

of by the Presbytery, and decern against the heritors for the contract price thereof, apportionable among them according to their respective liabilities. CHAP. XIV.

33. When such order is implemented and the building is reported to the Presbytery to be finished, they make a formal visitation of it, and on being satisfied that it is a suitable and sufficient dwelling-house, they pronounce a formal deliverance declaratory of its character and of the use to which it is dedicated, which operates as a formal designation of the building, offices, and garden ground *qua* "manse" or place of residence for the successive incumbents of the parish. Decree of designation.

SECTION VIII.—*Designation of a Glebe.*

34. The procedure by the Presbytery under a demand on the part of a minister for a glebe, or an addition to one, is substantially similar to that above pointed out. The claim by the minister involves the disposal of four points to which the Presbytery's attention requires specially to be called, viz. (1) the agricultural character of the ground to be allocated; (2) the order of liability to allocation of different portions of ground according as these are Church lands or temporal lands; (3) the situation of the lands to be selected; and (4) the quantity of ground to be designated (*a*). The ground on which the Presbytery's decree of designation of a glebe is brought under review has generally been an alleged infringement of the right or obligation of the minister and heritors respectively in respect of one or other of the particulars now adverted to (*b*). Similar procedure in designation of glebe.
Points to be considered.

35. When the Presbytery have fixed upon the ground whence the glebe is to be designated, they appoint a day for Perambulation of ground.

(*a*) See *ante*, CHAPTER X.

(*b*) See *Minister of Kingsbarns v. Erskine*, 1794, M. 5140; *Minister of Kingsbarns v. Hay*, 1799, M. *Glebe*, Appx. 2; *Parson of Dysart v. Watson*,

1665, M. 5139; *Marshall v. Carnegie*, 1605 M. 8495; *Minister v. Heritors of Logie*, 1686, M. 7957; *Campbell v. Morgan*, 1850, 12 D. 1262.

CHAP. XIV.

Its object.

a "perambulation," of which due notice should be given to the minister and the heritors generally, including in particular the owners of the ground proposed to be taken. The object of the perambulation is to ascertain and determine judicially the extent and boundaries of the glebe. With this view the Presbytery or their committee employ a man skilled in measuring land to mete the legal quantity, the precise boundaries of which, when surveyed, should be marked out by march stones or some other effectual mode of identification of the ground. The metster may be put upon oath (*a*), but whether he be so or not, it is of course his duty to make a careful and accurate survey and measurement of the ground, and a faithful report or return thereof to the Presbytery. If to any material extent his measurements upon which the designation is based be erroneous, this will afford a good reason for after challenge thereof (*b*). When the ground is duly marked out the Presbytery pronounce a deliverance, appropriating or designating the same as the glebe or as an addition to the glebe attached to the benefice (*c*). In the case of Edrachilles (*d*) the decree of designation was treated as equivalent to a bounding charter; and a general doctrine to this effect was there announced (*e*).

Erroneous measurement ground of challenge.

Designation of "minister's grass."

36. The mode of procedure on the part of the Presbytery in the designation of "minister's grass" (*f*) is substantially similar to that adopted in the designation of a glebe proper. In the case of Heriot (*g*), where one of the heritors suspended a decree of the Presbytery designing minister's grass out of

(*a*) See *ante*, p. 566 (*c*).

(*b*) In *Potter v. Ure*, 1710, M. 5129, one of the reasons of advocacy of the Presbytery's designation was that they had employed a person never known to be a sworn metster, and who, as was alleged, had grossly erred in his measuring.

(*c*) See *Kerse v. Reid*, 1626, M. 5132; *Hamilton v. Athlinton*, 1628, M. 7628, as archaic examples of disputes as to regularity of procedure.

(*d*) *Reay v. Falconer*, 1781, M.

5551, and 2 Hailes, 890, and there per Lord Braxfield.

(*e*) See *Minister of Lochlee v. Dalhousie's Tutors*, 1891, 17 R. 1060, 18 R. (H.L.) 72.

(*f*) *Supra*, CHAPTER XI.

(*g*) *Steel v. Dalrymple*, 1751, M. 7439. See also *Potter v. Ure*, 1710, M. 5129, where the Court of Session seem to have exercised, to some extent, a primary jurisdiction in the designation of a glebe proper.

his lands, on the ground that the designation was exorbitant in quantity, the Court made a remit to two of their own number to view the lands, and on their report selected a different portion from that chosen, and without any remit to the Presbytery decerned the same to belong to the minister. If there be no Church lands in the parish, or if all the Church lands which exist are arable, the minister's claim resolves into one for the subsidiary statutory allowance of £20 Scots annually in lieu of the provision *in forma specifica*, and the Presbytery's deliverance will contain a finding to this effect and a decerniture against the heritors for payment of the annual allowance according to their respective liabilities (a).

CHAP. XIV.

£20 Scots in lieu thereof.

37. In order to give effect to the claim of relief against the other heritors of the parish competent to the heritor, whose ground is taken for a manse site, a glebe, or a churchyard, the Presbytery were in use to insert in their decree of designation a finding to this effect and a relative decerniture against the other heritors for payment by each of them of a proportional amount of the value of the ground taken, to the extent of their respective liabilities, according to the real or valued rent of their lands, as the case might be. No such or similar decree pronounced by the Presbytery had any executorial effect *per se*; but it was enforceable by a warrant for diligence thereon granted by the Court of Session under the Act 1593, c. 164. By this statute the Court was authorised to grant letters of horning on ten days' charge to enforce obedience to the decree of Church judicatories, including Presbyteries. In the present day the Presbytery would

Decree of relief.

How enforced.

(a) In the Session papers in *Alexander v. Pinkerton*, 1826, 5 S. 185 (vol. cxxxv. No. 115, marked Appendix No. II.), there is an example of a stent roll made up, allocating on the several heritors the sums due by each for the annual allowance in question, which is approved of by the Presbytery, who, in the event of

the heritors, or any of them, refusing to make payment thereof, "humbly intreat the Right Honourable the "Lords of Council and Session" to grant letters of horning, charging the heritors and liferenters of the lands, their factors and tenants, to make payment of their respective shares yearly, conform to law.

CHAP. XIV.

Case of Kilbrandon.

be well advised to be content with the general finding and to leave the heritors to work out their own remedies *inter se*. In the case of Kilbrandon (*a*), about the beginning of the eighteenth century, it appears that a formal application was made by the minister to the Court by a bill to enforce the Presbytery's decree designating a glebe to him, on which letters of horning to charge the occupants to remove within ten days were granted. The later practice, however, seems to have been to present the Presbytery's deliverance, with a petition for letters of horning addressed to the Court of Session in the Bill Chamber; warrant conform was thereupon granted and was the authority for signet letters being granted to this effect. Designation at arm's length is now, however, so rare that there is no rule of recent practice.

Entailed lands,
not exempt
from designation.

38. While a strict entail, duly recorded, prevents the heir in possession from alienating the estate to which it applies, and also protects the lands from being adjudged by creditors or others, it has not the effect of excluding the operation of the provisions of public law. Hence those public statutes in virtue of which lands generally are made liable to designation affect lands although held under the fetters of an entail investiture. Such lands, equally with lands held in fee-simple, are by force of law indifferently liable to be appropriated by designation for a glebe proper or a grass glebe, or minister's grass; and, *pari ratione*, for manse ground or for a churchyard (*b*).

SECTION IX.—*Decree of "Free Manse."*

Condition of a
"free manse."

39. The Presbytery have always possessed the power, and, as has been generally understood, have been charged with the duty, of pronouncing a decree of "free manse" when the condition of the building is such as in point of law warrants such a deliverance. The decree proceeds on a

(*a*) Colin Lindsay, 1705, mentioned by Forbes, p. 218.

(*b*) 1 More's Stair, Note, p. excii.

visitation and inspection of the building, and on the ascertainment of its structural condition and extent of accommodation—generally under a report by men of skill. As formerly explained (*a*), the functions of Presbyteries in this matter have been in great measure superseded by the provisions of the Act 31 and 32 Vict. c. 96, section 12, under which the Sheriff has jurisdiction to pronounce a decree of free manse, which is operative for fifteen years.

CHAP. XIV.

When pronounced.

SECTION X.—*Excambion of a Glebe.*

40. As is elsewhere pointed out (*b*), the nature and effect of an excambion of the glebe imply the designation of a new glebe in lieu of the existing one. Although as a general rule Presbyteries are not entitled to make a second designation of a glebe within the same parish, this rule is so far relaxed, or departed from as to sanction their doing so when this is done in the form of an excambion.

Competent to Presbytery.

41. The transaction presupposes the consent of the heritor whose ground is to be taken for the new glebe in exchange for that of which the existing glebe consists, and practically proceeds on his consent, and that of the Presbytery. Although the consent of the minister and the other heritors generally is not essential (*c*), they or some of their number may have a good reason to object to the proposed arrangement; and as the change, if effected, will permanently alter the *status quo* of the benefice, it ought and is in use to be carried out in a formal and regular manner. Accordingly, it should be preceded by a visitation of the ground on the part of the Presbytery, after due intimation given to the minister and heritors; a formal report by persons of skill affirmative of the suitable character for a glebe of the ground to be acquired; and a regular decree of excambion by the Presbytery, declaratory that the old glebe ground has ceased to be, and the new portion of ground has now become, the glebe attached to the benefice.

Implied consent.

Should be formally effected.

(*a*) See *ante*, p. 387.(*b*) See *ante*, p. 467.(*c*) *Bain v. Seafeld*, 1887, 12 R. 62
14 R. 939.

CHAP. XIV. SECTION XI.—*Presbytery's Superintendence over Church and Manse Accommodation.*

What Presby-
tery's superin-
tendence em-
braces.

42. This right of superintendence on the part of Presbyteries—the origin of which has been already explained—embraces within the subject-matter of its exercise the provision and maintenance of church and manse. The duty and relative burden of providing and maintaining a church and a manse sufficient in both these respects devolves on the body of heritors in each parish, who, in terms of the Acts 1572, c. 54, *quoad* churches, and 1663, c. 21, *quoad* manses, are entitled and indeed bound to take the initiative in these matters respectively, and voluntarily to discharge the existing obligation. These statutes, however, contemplate and provide for failure or refusal on the part of the heritors to do so; and in this event have committed to the bishop of the diocese, and now constructively to the Presbytery of the bounds, the power and duty in the first place of ordaining the dilatory or recusant heritors themselves to take steps for executing the required operation. Failing their compliance with this order, the Presbytery may themselves adopt measures for having the operation executed at the heritors' expense.

When it
practically
emerges.

Heritors' right
of self-action.

Quoad
churches and
manses.

43. It is only in the event of the heritors delaying or refusing to take action that the Presbytery's right of interference emerges. This doctrine is supported and illustrated by *dicta* expressed or the course of procedure adopted in various cases in regard to the repair or rebuilding of churches, such as those of Stewarton (*a*), Dunoon (*b*), Kilmalcolm (*c*), Mauchline (*d*), and Stranraer (*e*). A similar rule applies to

(*a*) *Cunninghame v. Deans*, 12th Dec. 1811, F.C.

(*b*) *Campbell*, 19th May 1815, F.C. See per Lord Robertson. The latter part of the rubric in this case is bad law.

(*c*) *Porterfield v. Gardner*, 1829, 8 S. 277. See per Lord Ordinary Moncreiff, p. 281, foot.

(*d*) *Boswell v. Duke of Portland*, 1834, 13 S. 148. See *per curiam*, p. 155. In this case the body of heritors, *proprio motu*, ordered estimates, selected plans, and imposed an assessment for rebuilding the church.

(*e*) *M'Neel v. Robertson*, 1836, 14 S. 849. See per Lord Ordinary Moncreiff, p. 851.

the Presbytery's right of superintendence over manse. This principle, which is quite in accordance with the provisions of the Act 1663, c. 21, and prior relative statutes, is well recognised, and may be said to be in accordance with the course of procedure adopted in those cases generally where the Presbytery's right of interference was supported or enforced.

44. While this right of superintendence enables the Presbytery to require dilatory or recusant heritors to execute on the church or manse such structural operation as the case requires, it does not, on their neglect or refusal to obey the order, confer on the Presbytery any right to execute as on their behalf an operation different in kind or more extensive or costly than what, if executed by heritors themselves, would have satisfied their legal obligation. This active interference on the part of the Presbytery is not authorised as a penalty for the heritors' neglect, but as a statutory mode of securing the due performance of that which they ought themselves to have done. Accordingly, the extent of the heritors' obligation is the limit of the Presbytery's power; and *quoad* any excess in its exercise the heritors have a right of relief by way of appeal to the Sheriff, and from him to the Lord Ordinary on Teinds, as afterwards explained.

45. The principle now stated receives illustration from the numerous cases in which heritors have, in a process of advocacy or suspension, obtained a recall of the Presbytery's deliverance ordaining a church or manse to be repaired, or to be repaired and enlarged, or to be rebuilt, when the condition of the building and the circumstances of the case were such as did not impose on the heritors the obligation of executing the particular operation ordered. In support of this remark it is sufficient to mention the cases of Stewarton (*a*), Methven (*b*), and Neilston (*c*), and the applica-

What this superintendence implies.

Measure of the right.

Examples of the doctrine.

(*a*) *Cunninghame v. Deans*, *supra*.

(*c*) *Earl of Glasgow v. Miller*, 1831,

(*b*) *Lynedoch v. Smythe*, 1828, 6 9 S. 370; *affd.* 7 W. & S. 185.

S. 791.

CHAP. XIV.

tion of the general doctrine that the law as to the building and repairing of manse and churches is similar (*a*).

SECTION XII.—*Presbyterial Requisition to repair the Church or Manse.*

Presbyterial
interference
how invoked
and exercised.

46. The Presbytery's attention may be called to the state of the church or manse on a representation made to them by the minister (*b*), by an individual heritor (*c*), by one or more of the parishioners, or by a member of their own body. If the Presbytery be satisfied, or have good reason to think, that the building is in a state of disrepair, they may, by a deliverance to this effect transmitted to the clerk of the heritors, or otherwise duly intimated to that body, call upon them to take the state of the building into consideration, and adopt such measures, by way of repair or otherwise, as the circumstances require (*d*).

Order for
repairs only.

47. When the church or manse is, in point of law, in a state of disrepair, and also in a repairable condition, and the heritors take no action, the Presbytery may competently issue a requisition on the heritors to execute such repairs upon the building as will put it in a state of repair. This requisition is usually in the form of a deliverance by the Presbytery, containing an order on the heritors to the effect in question. It ought to be formal and distinct in its terms, and pronounced at a meeting of that body duly convened.

How state of
buildings
ascertained.

48. While law does not prescribe any particular mode or process which the Presbytery is to adopt to inform themselves as to the structural condition of a particular church or manse, before pronouncing an order on the heritors to repair

(*a*) Per Lord Braxfield in *Dundas v. Nicolson*, 1778, 2 Hailes, 802; per Lord Robertson in *Cunninghame v. Deans*, *supra*; and per Lord President Boyle in *Heritors v. Minister of Orlig*, 1851, 13 D. at p. 1335.

(*b*) *Hamilton v. Presbytery of Hamilton*, 1827, 6 S. 47; *McNeill v. Nicolson*, 1828, 6 S. 422.

(*c*) As in *Maxwell v. Gordon*, House of Lords, 1816, 4 Dow, 279, not reported in Court of Session.

(*d*) This was apparently the course adopted in Kirk-Session of *Lauder v. Goodman of Gallowshiels*, 1630, M. 7913.

it, the prudent course for the Presbytery to take—save when the state of disrepair or dilapidation is manifest and indisputable—is to obtain, and be guided by the professional opinion of a man “of skill,” such as an architect, builder, or other tradesman, according to the supposed particular defect on the building.

SECTION XIII.—*Presbyterial Requisition to enlarge the Church or Manse.*

49. Unless the state of disrepair and the consequent structural repairs upon the church be so extensive that an addition to the size of the building is of relatively small importance in relation to the cost of the whole work, the Presbytery has no jurisdiction to order the church to be enlarged (*a*). On the other hand, where extensive repairs are required upon the manse, the Presbytery may order the building to be enlarged and the accommodation to be increased (*b*).

Presbytery's powers to order enlargement of church or manse.

50. This structural operation is not only a much more extensive and costly one than that of repairing merely; it is also one which, as to its feasibility and its proper mode of execution, presupposes and requires professional knowledge or information. The propriety of ordering this operation to be carried out at all depends on a variety of considerations, based, *inter alia*, upon various matters of fact connected with the structural condition of the existing fabric, including the quality of its materials, the conformation of its parts, and also the character of the ground on which it stands. Nay, more, the cost at which the proposed alterations and additions can be executed is an important element for consideration, as on it, in a great measure, may depend the propriety of enlarging, as opposed to rebuilding, the structure. Hence, Presbyteries rarely if ever act on their own knowledge or observation alone of the state of the building in ordering an addition to

State of building which it implies.

(*a*) *Supra*, p. 124.

(*b*) *Supra*, p. 398 *et seq.*

CHAP. XIV.

Structural
condition, how
ascertained?

be made to the manse. The ordinary, if not the invariable practice, is to appoint men of skill to examine and report (1) on its structural condition; (2) on the best manner in which the necessary repairs and additions could be effected; and (3) the cost at which this could be done.

SECTION XIV.—*Presbyterial Requisition to rebuild the Church or Manse.*

State of build-
ing which it
implies.

51. As has already been fully explained (*a*), where the church or manse is not in a repairable condition, the Presbytery may order it to be rebuilt. In deciding whether in a given case, a church or manse is to be rebuilt instead of being repaired merely, or repaired and enlarged, various matters of fact must be ascertained, and their mutual bearing upon each other examined and determined—such as the cost of repairing merely, or of repairing and enlarging the existing building, as compared with that of erecting a new one of similar size; the estimated cost of upholding the old building after being repaired, and the probable period of its maintenance in a sufficient state; the probable cost of repairing and enlarging the old building as compared with that of erecting a new one of the requisite size. On this account, as well as from the very nature of the operation itself, it is necessary that before resolving on its execution, the Presbytery should have recourse to professional information and advice. Accordingly, in this case, as in that where the church is to be repaired and enlarged, the Presbytery are in use to appoint a man or men of skill to examine the condition of the existing building, and to report thereupon, and on the other matters above alluded to, and to prepare plans of the new church or manse and estimates of its cost.

Structural
condition, how
ascertained?

SECTION XV.—*Procedure on Application to Presbytery quoad Condition of the Church or Manse.*

52. When the Presbytery's attention is called to the con-

(*a*) CHAPTERS IX. and X.

dition of the church or manse, they are sometimes requested to make what is termed a "visitation" of the building, *i.e.* a formal inspection of it by themselves, or a committee of their number appointed for this purpose. When this course is to be adopted the Presbytery instruct intimation of the visitation to be made in the manner described *supra*, para. 30.

CHAP. XIV.

Presbyterial
"visitation."

53. When men of skill have been appointed by the Presbytery to examine and report on the state of the building, these persons usually attend at the visitation and give such explanations and information on the subject-matter of the inquiry as is required. The heritors, or some of them, or a committee of their number, and also the minister, are ordinarily present at the visitation. Sometimes they employ a man or men of skill of their own appointment to act on their behalf, and attend to their interests at the inspection of the building; but not infrequently they concur with the Presbytery in a joint nomination of men of skill, or approve of those selected by that body. In the case of Anwoth (*a*), where, as in that of Kirkintilloch (*b*), the latter alternative was adopted, the tradesmen were put upon oath by the Presbytery (*c*).

Attendance of
men of skill.Oath ad-
ministered.

54. On the other hand, the Presbytery may, without any previous "visitation," appoint a meeting of their body to be called to consider the condition of the church or manse, notifying this to the minister, and requiring intimation to be made from the pulpit or precentor's desk, and to the non-resident heritors by circulars, of the time, place, and purpose of the meeting (*d*), that the heritors may attend and be heard for their interest.

Meeting of
Presbytery.

55. At this meeting the Presbytery take into considera-

State of build-
ing considered.

(*a*) Maxwell v. Gordon, House of Lords, 1816, 4 Dow, 279, not reported in Court of Session.

(*b*) Murray v. Presbytery of Glasgow, 1833, 12 S. 191.

(*c*) On this point see *ante*, p. 566 (*c*).

(*d*) As in Minister v. Heritors of Dunning, 1807, M. Kirk, Appx. 4, and Maxwell v. Gordon, *supra*.

CHAP. XIV.

Resolution
adopted.Citation *apud
acta*.Plans, when
submitted to
Presbytery.

tion the state of the building, and from information on the subject furnished by the men of skill, orally or in writing, or otherwise obtained, and after hearing any explanations or proposals made by any heritors present, the Presbytery may, either at this or at an adjourned meeting, adopt a resolution on the subject, which is thereafter formally communicated to the heritors, or to the minister, or to both according to its import. When the resolution involves enlargement or rebuilding, the relative deliverance usually contains an order on the heritors to furnish plans and specifications of the additional or new building.

56. When the meeting is adjourned, or a renewed meeting is to be held, it is usual for the Presbytery then and there to give what is termed citation *apud acta* to the heritors, tradesmen, and others, not members of the meeting, whose presence at the subsequent diet is requested or required (*a*). This operates as formal intimation thereof to them, and supersedes the necessity of renewed edictal or written notice to these parties.

57. When the body of heritors have of their own accord adopted steps to execute the appropriate operation on the church or manse according to certain plans and specifications, it does not seem obligatory on them to submit these for the consideration of the Presbytery (*b*). At the same time this is frequently done; and for obvious reasons it is, in many instances, convenient and satisfactory for the heritors to obtain the Presbytery's approval of the proposed operations before commencing to execute them. When the particular operation is undertaken by the heritors in obedience to a Presbyterial deliverance to this effect, which contains an order on them to furnish plans and estimates for the consideration of the Presbytery, then it is the duty of the heritors

(*a*) In *Porterfield v. Gardner*, 1829, 8 S. 277, the heritors were cited in this way to a subsequent meeting of Presbytery

(*b*) *Ante*, pp. 129-30.

to submit plans for the Presbytery's inspection and approval. The Presbytery, however, have no right of interference with the plans proposed by the heritors further than to see that the accommodation provided is sufficient and suitable, and in particular they have no right to prescribe the style or arrangements of the building (*a*).

SECTION XVI.—*When Presbytery may proceed to execute its own Order.*

58. Assuming the Presbytery to have pronounced a formal deliverance, requiring the heritors either to take into consideration the state of the church or manse and to remedy the alleged existing defect in its condition, or to execute upon or in reference to it, one or other of the specified operations above mentioned, then if, without bringing such deliverance under review of the Civil Courts, the heritors nevertheless neglect or refuse to implement it, the Presbytery are entitled themselves to carry it into effect. With this view the Presbytery may make a visitation of the building or convene a meeting of their body to consider its condition, and may remit to men of skill to examine and report upon it and upon the proper operation to be executed, and to prepare and submit for their guidance plans and estimates of the mode in and cost at which such operation may be executed.

On refusal or delay by heritors Presbytery may execute its own order.

59. After having thus or otherwise obtained competent and sufficient information on the subject, the Presbytery consider what course ought to be taken, and when they decide that a particular operation is to be executed they pass a resolution to this effect. In this deliverance, which ought to contain findings applicable (1) to the existing state of the building, and (2) to the special operation which they have resolved ought to be executed, they ordain the same to be executed accordingly conform to certain plans and speci-

Import of Presbytery's deliverance.

(*a*) *Ante*, pp. 130-31.

CHAP. XIV.

cations approved of; authorise a contract to be entered into for the work; decern against the heritors for the contract price thereof; and appoint a collector to apportion the same among the heritors according to a specified rule of valuation, and obtain payment from them of their respective quotas. While such is the general import of the deliverance pronounced, it is, of course, subject to variations in its terms, according to the circumstances of each case, and the nature of the operation to be executed.

Their power to contract.

60. As it is the Presbytery's duty not only to appoint or ordain the heritors to execute the required operation, but, when necessary, to take steps for securing that this is actually done, the practical discharge of this duty implies that the Presbytery by themselves, or by a committee of their number, or through a person appointed by and representing them, such as the minister, are entitled—failing the heritors doing so—to enter into contracts for the execution of the work. The existence of this right on the part of Presbyteries is implied in the opinions delivered in the case of Dunoon (*a*), has been recognised in subsequent instances, and was practically exercised in, among other cases, those of Wick (*b*) and Duddingston (*c*).

Presbytery represent the heritors.

61. When the Presbytery so contract for the repair or rebuilding of the church or manse, and carry the work into execution, they are held to be acting in place and for behoof of the heritors, whose duty in the matter they are truly discharging. Consequently, and in respect that the expense of the operation must ultimately be defrayed by the heritors, the heritors are entitled to superintend the same in the course of its progress, with the view of seeing that good materials are furnished and good workmanship applied. The heritors cannot be deprived of this right of inspecting the

(*a*) See per Lord Robertson, as concurred in by Lords Bannatyne and Glenlee, in Campbell, 19th May 1815, F.C.

(*b*) Dunbar, 1804, M. *Jurisdiction*, Appx. 11.

(*c*) Sanderson v. Macfarlane, 1868, 6 M.P. 701.

work, even although the Presbytery may have delegated its execution to another. Nor can the person who undertakes its execution successfully maintain that he is not accountable to the heritors for the manner in which the work is done, on the ground that the contract was entered into not with them, but with the Presbytery (*a*).

CHAP. XIV.

Heritors' right of superintendence.

62. While in the case now supposed (*b*) the Presbytery are entitled to contract for and proceed with the execution of the work required, and decern against the heritors for their respective proportions of the cost (*c*), the Presbytery should not lay on an assessment on a mere conjecture as to the probable expense. As a general rule, they seem to be entitled to impose an assessment only after a contract has been concluded, or estimates have been furnished by builders or tradesmen of the price at which they undertake to execute the particular operation decided on (*d*). This, as was observed in the case of Kilmalcolm (*e*), arises from the principle that Presbyteries possess no general power of assessing heritors, but only a subsidiary right to decern against them for payment of the actual cost of a church or a manse, the erection of which is necessary. A similar rule will, in most instances, apply to the case where a manse has been ordained by the Presbytery to be enlarged—as this operation, like that of rebuilding, generally presupposes the feasibility and propriety of obtaining beforehand a regular estimate and contract for the work. In cases of mere repair, however, this is often impossible; and here accordingly the rule will probably be

Presbytery's power to assess.

(*a*) See Dunbar, *supra*.

(*b*) Viz. when the heritors refuse or delay to execute the operation specified in the Presbytery's deliverance, and have not brought it under review of the Civil Courts.

(*c*) As in *Maxwell v. Gordon*, House of Lords, 1816, 4 Dow, 279, not reported in Court of Session.

(*d*) *Ibid.* p. 283, foot and over.

(*e*) *Porterfield v. Gardner*, 1829, 8 S. 277, and there per Lord Ordinary Moncreiff, who says, p. 281: "The

" Presbytery's jurisdiction consists
 " in a right to see that a sufficient
 " church is provided,—a right to
 " assume the direction of the matter,
 " if there be undue delay,—and a
 " right to give decree, if necessary,
 " for assessing the heritors for the
 " sum duly ascertained to be proper
 " and necessary for defraying the
 " actual expense of a specific build-
 " ing;" and again at p. 282, to the
 effect stated in the text.

CHAP. XIV.

relaxed. In such instances, the correct course apparently for the Presbytery to adopt is—not to decern against the heritors for the probable cost of the repairs, but to await their completion, and then to call on the heritors to assess themselves, and failing their doing so, to decern against them for the actual expense incurred.

Decree, when pronounced ?

63. As a general rule the Presbytery seem to be entitled to decern against the heritors for payment of the cost of a particular operation, and to impose on them a relative stent only in the event of refusal, actual or constructive, on their part to do so themselves (*a*). In all cases the Presbytery's decree should bear reference to a specific sum—viz., the actual amount of the expense incurred, or of the contract price of the work. Their decree has no executorial effect *per se*; but in terms of the Act 1572, c. 54, the Court, on application to this effect, is authorised to grant letters of horning and poiding to enforce execution (*b*).

How enforced.

Review of rule of assessment.

64. The Court are not inclined to dispose of the abstract question of the propriety of the rule adopted by the Presbytery in imposing church or manse assessments summarily, as in a suspension at the instance of certain heritors only, of a charge given them under the Presbytery's decree by the collector, the other heritors of the parish not being parties to the process. In the case of Duddingston (*c*), where such a suspension was brought, the Court sisted the process to enable the collector or the Presbytery to bring an action of declarator on the subject to which all parties interested might be called.

(*a*) Thus in *M'Neel v. Robertson*, 1836, 14 S. 849, Lord Ordinary Moncreiff says, p. 851: "The Presbytery have no power to take estimates, or give decrees for money, unless the heritors refuse to assess themselves." In one case, *Earl of Glasgow v. Miller*, 1831, 9 S. 370, affd. 7 W. & S. 185, the Presbytery appear to have appointed a collector to levy the assessment before the work which they had ordered was

entered into, but this was an irregular course. In this case the collector was found liable in expenses to the heritors with a right of relief against the Presbytery.

(*b*) See *Parishioners of Port*, 1666, M. 8499; *Presbytery of Deer v. Heritors of Pitsligo*, 1876, 3 R. 975.

(*c*) *Duke of Abercorn v. Presbytery of Edinburgh*, 1869-70, 7 M.P. 875, 8 M.P. 733.

SECTION XVII.—*Review of Presbyterial Deliverances.*

CHAP. XIV.

65. While none of the old statutes, in virtue of which Presbyteries exercise a right of jurisdiction or superintendence over heritors, in regard to providing and maintaining church, manse, glebe, or churchyard accommodation, specially declares that their deliverances or proceedings on these subjects are liable to appeal, it has all along been practically admitted or assumed that the Court of Session possesses an inherent right of review thereof (*a*). The judgments of the Court of Session, as such tribunal of review, were in their turn subject to review by the House of Lords. Numerous instances to this effect have been already cited in the preceding pages (*b*). The Act of 1868, 31 and 32 Vict. c. 96 (*c*), operated two important changes in the matter now alluded to. On the one hand, the statute introduced an intermediate appeal to the Sheriff, and on the other hand, it vested in and confined to the Lord Ordinary in Teind Causes the review jurisdiction which was formerly possessed by the Court of Session generally, and it has terminated the former review jurisdiction of the House of Lords, by declaring that the judgment of such Lord Ordinary is final. The jurisdiction conferred on the Sheriff is not concurrent with that possessed by the Presbytery, but appellate merely.

Review under
the former law.

Changes introduced by 31
and 32 Vict. c.
96.

66. Under the law as it formerly stood, the minister or the body of heritors of the parish, or even any individual heritor (*d*), who considered himself to be aggrieved by a resolution or decree of the Presbytery, declaratory of the structural condition of the church or manse, or ordaining the execution upon it of a specified operation, or designating ground for the site of a church or a manse, or for a glebe, or a church-

Who might
appeal.

(*a*) Per Lord Robertson in *Cunninghame v. Deans*, 12th Dec. 1811, F.C.

(*b*) Among others, *Harlow v. Merchant Maiden Hospital*, 1802, 4 Paton, 356; *Mansfield v. Wright*, 1824, 2 Shaw App. 104; *Shaw v. Forbes*, 1830, 4 W. & S. 300; *Earl*

of *Glasgow v. Miller*, 1834, 7 W. & S. 185.

(*c*) See Appendix, p. 662.

(*d*) Per Lord Robertson in *Campbell*, 19th May 1815, F.C., who observes, "any individual heritor is at liberty to suspend."

CHAP. XIV.

Form of
review.

yard, might appeal against the same directly to the Court of Session. When the order of the Presbytery was in its nature declaratory merely, the appropriate form of appeal was by way of advocacy (*a*). When, on the other hand, the order was in its nature operative, the form of appeal was by way of suspension, so as to stay execution upon it (*b*).

Concurrence of
heritors un-
necessary.

67. In the case of *Dunning* (*c*) it was pleaded that neither the Presbytery nor the minister could appear in the Court of Session in support of a Presbyterial deliverance without the concurrence of some one or more of the heritors. This plea, however, was there overruled, and no doctrine to such an effect has ever since been recognised. In point of fact, the Presbytery's judgment is frequently supported only by the person whose interest it is to maintain it, such as the minister. Sometimes, however, the Presbytery also appear as respondents in the process of review; but, as they may have no direct interest in the result of the appeal, they frequently do not appear.

Appeal to
Sheriff by 31
and 32 Vict.
c. 96.

68. By section 3 of the Act 31 and 32 Vict. c. 96, an appeal may be taken by the minister or any heritor of the parish to the Sheriff of the county in which the parish is situated against any order, finding, or decree, within twenty days of its date, pronounced by the Presbytery of the bounds, in proceedings before them relating to (1) building, rebuilding, repairing, or otherwise altering churches, manse, or churchyard dykes; (2) designating or excambing glebes (including arable and grass glebes, and minister's grass), churchyards, and sites for churches and manse. The appeal must not only be taken by presenting a petition to the Sheriff, as mentioned

(*a*) As in *Minister v. Heritors of Dunfermline*, 1805, M. *Manse*, Appx. 1, *quoad* the Presbytery's decree of 7th Jan. 1803, designing a manse, affd. 5 Pat. 593; and *Potter v. Ure*, 1710, M. 5129.

(*b*) This was the form of appeal in, among others, the following cases, viz. *Minister of Morham v. Binston*, 1679, M. 8499; *Steel v. His Parish-*

ioners, 1712, M. 5131 and 8498; *Greenlaw v. Heritors of Creich*, 1778, 5 Br. Supp. 513; *Robertson v. Earl of Rosebery*, 1788, M. 8515; *Shiells v. Heritors of Channellkirk*, 1818, 13 S. 1018; *Hamilton v. Presbytery of Hamilton*, 1827, 6 S. 47, *M'Neill v. Nicolson*, 1828, 6 S. 422.

(*c*) *Minister v. Heritors of Dunning*, 1807, M. *Kirk*, Appx. 4.

in next paragraph, but must also be intimated to the session clerk within the twenty days (*a*). The term Sheriff includes Sheriff-Substitute; and that of heritor means the proprietor of heritable property within the parish, who is liable to an assessment according either to the real or the valued rent in respect of any of the above operations (*b*).

Sheriff includes Substitute.

69. The appeal is in the form of a summary petition to the Sheriff of the county, praying him to stay the proceedings and dispose thereof himself. When the parish is partly situated in different counties, the Sheriff to whom the appeal is first presented is vested with jurisdiction in its disposal (*c*). Within ten days from the date of its presentation, the appellant or his agent must intimate the appeal by circular letters through the post-office, addressed to (1) each of the heritors or his factor or agent (when their number does not exceed forty); (2) their clerk, if any; (3) the minister, if the cure be full; and (4) the Presbytery clerk. When the heritors exceed forty in number, it is sufficient intimation that a copy of the appeal be affixed to the principal door of the church for two successive Sundays next after the date of presentation, with notice thereof inserted in a newspaper circulating in the county during each of two successive weeks (*d*).

Form of appeal.

To whom intimated.

70. The effect of an appeal so taken and intimated to the Presbytery clerk has the effect of staying proceedings under the order appealed from. If, after its presentation, the appellant unduly delay to follow out the appeal, the Presbytery clerk, the minister, or any of the heritors—not being the appellant—or their clerk by their orders, may sist himself as a party to and follow out the appeal. If no appeal be taken and duly intimated to the Presbytery clerk within the

Stay of proceedings.

(*a*) *Heritors v. Presbytery of Auchterarder*, 6th Nov. 1902, 40 S.L.R. 45.

(*b*) 31 and 32 Vict. c. 96, s. 1. In the case of *Magistrates of Glasgow v. Maclean*, 1902, unreported, it was held that the magistrates of a burghal

parish are not *qua* magistrates heritors within the meaning of the definition, and that accordingly the old remedies of appeal (*vice* advocacy) and suspension are open to them.

(*c*) *Ibid.* s. 4.

(*d*) 31 and 32 Vict. c. 96, s. 5.

CHAP. XIV.

Procedure
before Sheriff.

period of twenty days, the Presbytery's deliverance is final and not subject to review (*a*).

71. On the appeal coming before the Sheriff, or his Substitute, he is to satisfy himself that due intimation thereof has been made, or to order such to be made. He is then to hear the parties without written pleadings, unless specially ordered by him—taking, however, a note of the proceedings and of any evidence laid before him (*b*). The effect of the appeal is to remove the whole case to the Sheriff Court, not merely to submit the particular finding complained of to review (*c*).

In a case of
rebuilding.

72. When the appeal relates to the question of *rebuilding* a church or manse, then—unless the matter is foreclosed by a final judgment of the Presbytery—the Sheriff is to consider, in the first place, whether, under the law applicable to the facts of the case, a new building should be erected or the existing one repaired (*d*). To enable him to do this, he may take such evidence or make such remits to men of skill as he thinks fit, and thereafter pronounce a relative finding (*e*). When the appeal relates to the question of *building or repairing* the church or manse, the Sheriff may, with the aid of such professional assistance as he deems necessary, inquire into the truth of the statements in the petition (*f*), and pronounce a relative finding. In the case of either of such appeals, the Sheriff may, if he sees cause, dismiss them (*g*).

Building or re-
pairing.

(*a*) *Ibid.* s. 3. See *Heritors v. Presbytery of Auchterarder*, *cit.*

(*b*) *Ibid.* s. 6.

(*c*) *Oliphant v. Presbytery of St. Andrews*, 1901, 38 S.L.R. 484.

(*d*) In the case of *Minister v. Heritors of Ardrossan*, 1902, unreported, the Sheriff-Substitute held that under a petition for rebuilding it is not competent, after ascertaining that rebuilding is unnecessary, to consider the question whether any, and if so, what repairs are necessary, but this view was negatived by the Lord Ordinary.

(*e*) *Ibid.* s. 7. It is contrary to

practice to allow proof in such cases, and in one case where proof had been allowed by the Sheriff-Substitute the Lord Ordinary recalled this order and made a remit to a man of skill, —*Smith v. Heritors of Prestonpans*, 29th Nov. 1902.

(*f*) The petition here referred to is apparently the petition of appeal. If so, this provision seems to assume that the petition of appeal is to contain a full statement of the facts of the case and grounds of the appeal.

(*g*) 31 and 32 Vict. c. 69, ss. 7 and 8. The words are “dismiss the “petition.” The only petition men-

73. When the Sheriff finds that the church or manse is to be built, rebuilt, or repaired, but the heritors delay or refuse to give effect to such finding, he may remit to a professional person to prepare plans and specifications applicable to the particular operation, and after hearing objections thereto the Sheriff may ordain the same to be executed, or remit to a professional person to receive and accept tenders for and superintend the execution of the work according to the plans and specifications as approved of. The Sheriff is to find the heritors liable in the expense of the operation, and assess the same with a sum to cover the cost of collection on them, according to their real or valued rents as the case may be, and to give decree for payment thereof in such instalments and on such conditions as he may direct (*a*). Provisions to a similar effect apply in the case of proceedings before the Sheriff applicable to building or repairing churchyard walls (*b*).

CHAP. XIV.

Remit to prepare plans and estimates.

Decree for expenses.

74. The order, finding, or judgment pronounced by the Sheriff or his Substitute under the Act in regard to the designation or excambion of Church property, or the execution of any of the foresaid structural operations, becomes final, and not subject to review of any kind, on the expiry of twenty days from its date, during the currency of which period extract of the interlocutor is incompetent (*c*). Within this period an appeal may be taken to the Lord Ordinary on Teinds, which may be in the form either of a note engrossed at the end, or on the margin of the interlocutor, or of a

When Sheriff's judgment final.

Form of the appeal.

tioned in the statute is the petition of appeal, and accordingly to dismiss it seems to mean to dismiss the appeal, with the effect of sending the case back to the Presbytery. This does not altogether harmonise with other language in the statute, which seems to treat the appeal not as an appeal proper, but as a removing of the cause to the Civil Courts,—see *Oliphant v. Presbytery of St. Andrews*, 1901, 38 S.L.R. 484.

(*a*) *Ibid.* s. 9.

(*b*) *Ibid.* s. 10. It will be observed

that ss. 9 and 10 leave untouched the rule of liability—whether that of the real or the valued rent—according to which heritors are to be assessed for defraying the cost of executing the different operations therein referred to. S. 23 re-enacts the provisions on the subject of the rule of assessment for parochial burdens, contained in s. 33 of 17 and 18 Vict. c. 91. See p. 541.

(*c*) 31 and 32 Vict. c. 96, ss. 14 and 17.

CHAP. XIV.

Notice of
appeal.

separate note lodged with the Sheriff-Clerk, signed by the appellant or his agent, and bearing the date of signing (*a*).

75. Within two days from the date of the appeal the Sheriff-Clerk must send notice thereof to the respondent or his agent (*b*), and transmit the process to the Depute-Clerk of the bar of the Lord Ordinary to whom the appeal is taken, and the Depute-Clerk is to mark the day of its receipt. After the expiry of eight days from that date, either the appellant or the respondent may enrol the cause in the Lord Ordinary's roll for being proceeded with (*c*).

Effect of
appeal.

76. The effect of taking such appeal is to submit to the review of the Lord Ordinary the whole orders pronounced by the Sheriff in the cause, in so far as not final, to the effect of enabling his Lordship "to do complete justice" without any counter appeal. Unless with leave of the Lord Ordinary, the appellant cannot withdraw from the appeal, and the same may be effectually insisted in by any party in the cause though not the appellant (*d*). In the disposal of the appeal the Lord Ordinary is vested with all the powers competent to the Sheriff, including the disposal of the question of expenses and decerniture therefor. All orders, findings, and judgments pronounced by the Lord Ordinary are final and not subject to review (*e*).

Lord Ordinary's powers.

Changes in
former law.

77. From what has now been said, it appears that the leading changes effected by the Ecclesiastical Buildings and Glebes Act, and by the Court of Session Act, 1868, section 64, on the state of the law formerly existing *quoad* the review of Presbyterial deliverances, are—(1) that an intermediate review tribunal, viz. the Sheriff Court, has been introduced; (2) that the form of review by "advocation" or suspension has been abolished, except in exceptional circum-

(*a*) *Ibid.* ss. 14, 16.

(*b*) *Ibid.* s. 19.

(*c*) *Ibid.* s. 20.

(*d*) *Ibid.* s. 18.

(*e*) *Ibid.* ss. 15, 20. Heritors v. Presbytery of Auchterarder, 6th Nov.

1902, 40 S.L.R. 45; Heritors of Pit-sligo v. Gregor, 1879, 6 R. 1062. Cf. Magistrates v. Presbytery of Arbroath, 1883, 10 R. 767; Walker v. Presbytery of Arbroath, 1876, 3 R. 498, 4 R. (H.L.) 1.

stances (a), and that by way of appeal substituted; (3) that the appeal to the Court of Session must now be taken to the Lord Ordinary on Teinds; and (4) that the general right of review of such deliverances by the Inner House, and ultimately by the House of Lords, is abolished.

SECTION XVIII.—*Remits by Court to examine Buildings, &c.*

78. When, as is usually the case, the disposal of the appeal involves minute acquaintance with the actual state and condition of the building, and other matters connected with the cost of proposed repairs or other structural operations, the Court are, for the purpose of acquiring reliable information on these and kindred points, in use to remit to a man of skill to examine and report, and when necessary to prepare and furnish plans and specifications. It is unusual to allow a proof (b). While the actual terms of the remit made to the reporter will, of course, indicate the scope of the report, it may, as a general rule, be stated that he should confine himself therein to a statement of ascertained facts, and of opinions which are of the nature of scientific or professional deductions therefrom. The object of the remit is to furnish the Court with reliable data on which to determine the legal rights of the parties.

Remits, to whom made.

To what points report should be confined.

79. The reporter should intimate to the parties or their agents when he intends making an inspection of the building with the view of affording them an opportunity of being present. They are entitled to bring under his notice all matters pertinent to the question at issue, and to make all relevant explanations. It is the duty of the reporter to consider and give such effect to them, by reference thereto in his report or otherwise, as he thinks will in a satisfactory and exhaustive manner carry out the purposes of the remit.

Reporter should hear parties when requested.

(a) See *supra*, p. 585, note (b).

(b) See *supra*, p. 586, note (c).

CHAP. XIV.

Report basis of
Court's judg-
ment.

80. When the report is distinct in its terms and sufficiently full in point of statement and professional opinion, and is not in any essential respect inconsistent in its details, the Court are in use to adopt it as the basis of their judgment. They are not inclined to remit *de novo* to another person on the motion of any of the parties dissatisfied with the result arrived at in the report. Before pronouncing judgment in the cause the Court allow the parties an opportunity of being heard on the report, and of stating objections thereto, either orally or in writing.

Reports, how
treated.

81. When the deliverance under review, whether pronounced by the Presbytery or by the heritors, is founded on a report by men of skill, under a remit of either of these bodies, the Civil Court does not deal with its contents as evidence but as matters of averment merely (*a*), and, as already stated, usually disposes of the case exclusively on the report made to it by the person selected by itself (*b*). His report forms the evidence on the subject of the remit, and, unless good objections can be substantiated against it, is usually taken as the verdict of the proper tribunal in the matter (*c*). From the course adopted in the case of Kirkintilloch (*d*), it would appear that where no objections were stated against the report ordered by the Lord Ordinary while the cause depended before him, the Inner House, on a review of his judgment, accepted that report *pro veritate*, and, dealing with it on this footing, refused to open it up by putting additional queries or making a remit of new.

As matters of
averment, or as
evidence.

Contracts
authorised by
Court.

82. When the judgment pronounced on the deliverance under review was to the effect of requiring the heritors to

(*a*) See per Lord President Inglis (then Lord Justice-Clerk) in *Bertram v. Presbytery of Lanark*, 1864, 2 M'P. at p. 1411.

(*b*) See *Macrae v. Wilson*, 1849, 11 D. 1488; also *Murray v. Presbytery of Glasgow*, 1833, 12 S. 191.

(*c*) Per Lord Neaves in *Bertram v. Presbytery of Lanark*, *supra*, 2 M'P. at p. 1413.

(*d*) *Murray v. Presbytery of Glasgow*, *cit.*

execute a particular operation, such as to rebuild the church or manse, the Court have sometimes ordained the heritors or a committee of their number to proceed with the operation, and failing their doing so, have authorised the Presbytery (*a*) or the minister (*b*) to enter into contracts for this purpose.

SECTION XIX.—*The Presbytery's Expenses.*

83. Heritors are liable to the Presbytery in relief of any expenses incurred by the Presbytery in the reasonable exercise of their duties in relation to fabrics as the guardians of the benefice. Accordingly the Presbytery may receive from the heritors the costs which the Presbytery have incurred in the employment of men of skill to report upon buildings, and also the amount of any account incurred in the necessary employment of professional legal assistance. The Presbytery may decern against the heritors for payment so long as the process is in dependence before the Presbytery, or they may subsequently recover the amount from the heritors by an ordinary action (*c*.)

(*a*) See *Rutherford v. Stewart*, 1812, mentioned by Connell Par. Supp. p. 66, where, on the heritors' failure to obtain an order to build the church, the Lord Ordinary authorised the Presbytery to complete the building.

(*b*) See *Campbell*, 19th May 1815,

F.C., where Lord Ordinary Pitmilley authorised the minister to enter into contracts for building the church in the event of the heritors failing to do so within a specified period.

(*c*) *Presbytery of Deer v. Heritors of Pitsligo*, 1876, 3 R. 975.

CHAPTER XV.

THE KIRK-SESSION IN ITS CIVIL RELATIONS.

CHAP. XV.

SECTION I.—*Constitution and Duties of the Kirk-Session.*

Constitution
of kirk-session.

1. The Kirk-Session is the lowest of the four judicatories of the Church and is the church court of the parish, as the Presbytery is that of the district, and the Synod that of the Province. The kirk-session is composed of the minister (or, in the case of a collegiate parish, of the ministers) and the elders. New elders are chosen from time to time from the communicants by the kirk-session itself. The congregation are sometimes consulted as to the choice, but they have no *right* in the matter other than to state objection to persons proposed by the session who may be deemed unsuitable. It is essential to the constitution of a meeting of kirk-session that a minister should preside as moderator. If the cure is vacant the Presbytery appoints one of its number to act as moderator. In addition to the moderator there must be two elders to form a quorum. If two elders are not available the Presbytery appoints from its own number an assessor or assessors to make up a quorum.

Duties of kirk-session.

2. The duties of the kirk-session are partly administrative, partly judicial. In the latter capacity the kirk-session is a judicatory recognised by the law. It receives from the Civil Courts the same recognition within its own province, and is entitled to the same assistance in such matters as enforcing the attendance of witnesses as the higher courts of the Church. One of the most important functions of the kirk-session is the annual examination and attestation of the communion roll, and the revision of that

roll in the event of a vacancy in the cure of the parish. This matter has been already dealt with in Chapter III. Another right of the kirk-session is the appointment of certain Church officials, a matter referred to in the next chapter. As explained in Chapter VI. the heritors frequently delegate to the kirk-session the whole or a share of the administration of the churchyard. Other duties of a more purely ecclesiastical character, such as the fixing of the date for the communion, the admission of young communicants, and the exercise of Church discipline, do not fall within the scope of this treatise. There remain, however, one or two functions of the kirk-session in relation to the civil life of the parish which it is proper here to notice. Generally, however, it may be remarked that, with reference to most of the subjects treated of in this volume—churches, manse, glebes, &c.—whilst the Presbytery has important functions, the kirk-session is rarely recognised.

SECTION II.—*Kirk-Sessions and the Poor.*

3. Formerly the kirk-session had important rights and duties in connection with the administration of the Poor Law. The matter, which is now mainly of historical interest, is fully explained in the treatises of Mr. Dunlop and Mr. Duncan. Down to the passing of the Poor Law Act of 1845, the administration of parochial poor relief was vested in the heritors and kirk-session jointly. From 1845 down to 1894 it was vested (a) in the Parochial Board, consisting of the members of the kirk-session and certain popularly elected members. In 1894, by the Local Government (Scotland) Act of that year, the administration was transferred to the Parish Council, and the kirk-session ceased to have any concern with the matter. There remain, however, two cognate matters in which the kirk-session are still interested—church-door collections and certain parish charities.

The kirk-session and the Poor Law.

57 and 58 Vict. c. 53.

(a) Except in a few parishes which voluntarily adhered to the old system.

CHAP. XV.

Church-door
collections
prior to 1845.

4. Prior to 1845 the provision for relief of the poor came from two sources. The primary source was the ordinary church-door collections. If this fund proved insufficient, the deficiency was met by an assessment upon the heritors and occupiers in the parish. One-half of the church-door collections was dedicated to the support of the legal poor, *i.e.* of regular paupers. The other half was at the discretionary disposal of the kirk-session for relief of casual or occasional poverty. There was nothing to forbid the kirk-session to devote more than one-half to the support of the legal poor, but they could not be compelled to do so, or to put more than one-half at the disposal of the heritors and themselves for that purpose. In some parishes the heritors in practice shared with the kirk-session the administration of the fund for the legal poor, but in other cases the heritors left the whole care to the session, who in this case were held to act as upon behalf of themselves and the heritors.

Change introduced by 8 and 9 Vict. c. 83.

5. The Poor Law Scotland Act, 1845, provides (section 54):—

“Church Collections in assessed Parishes.—In all parishes in which it has been agreed that an assessment should be levied for the relief of the poor, all monies arising from the ordinary church collections shall, from and after the date on which such assessment shall have been imposed, belong to and be at the disposal of the kirk-session of each parish: Provided always, that nothing herein contained shall be held to authorise the kirk-session of any parish to apply the proceeds of such church collections to purposes other than those to which the same are now in whole or in part legally applicable, or to deprive the heritors of their right to examine the accounts of the kirk-session and to inquire into the manner in which the funds have been applied: Provided also, that the session clerk or other officer to be appointed by the kirk-session shall be bound to report annually, or oftener if required, to the Board of Supervision as to the application of the monies arising from church collections; and if such session clerk or other officer shall refuse to make such report when required he shall be liable to a penalty not exceeding five pounds.”

Effect of foregoing provision of Act of 1845.

6. The effect of this provision when it became operative in a parish was that the church-door collections ceased to be

part of the provision for the support of the legal poor. The bipartite division of the fund came to an end and the whole became applicable as one fund for certain purposes. These purposes could not include the purpose for which the half devoted to the legal poor had formerly been applied, for this purpose was now met by other funds in the hands of other administrators. The whole fund was therefore applicable to some or other of the purposes to which the kirk-session's own half had formerly been applicable. What were these purposes?

7. The most recent judicial pronouncement upon the subject was an observation by Lord Trayner, who in the *Bo'ness* case (*a*) indicated that the money was applicable for relief of the poor, and that "the kirk-session certainly could not take money out of the church-door collections for purposes in connection with the church." In the same case Lord Stormonth Darling took another view, and Lord Trayner's remark was *obiter* and incidental, and was probably not intended as a considered statement of the result of the authorities. There is indeed some authority and there was constant practice the other way. The practice seems always to have been to provide out of the kirk-session's half of the church-door collections whatever was necessary, in supplement of the legal obligation of the heritors, for the proper transaction of kirk-session business and the becoming conduct of Divine worship.

Purposes to which collections might be applied.

8. The *Cambuslang* case (*b*), which is often appealed to in connection with this question, arose out of circumstances so peculiar that the case must be regarded as in great measure special. *Cambuslang* had been visited by an extraordinary religious revival, so abnormal in its manifestations that it led

Cambuslang case.

(*a*) *Parish Council v. Kirk-Session of Boness*, 1900, 2 F. 661.

(*b*) *Hamilton v. Ministers of Cambuslang*, 1752, M. 10,570; *Elchies, Kirk-Session*, 2, and Notes, 238. The account of the result of the case in *Elchies* does not quite tally with that

in *Morison*. It is not quite clear from the report of the case whether it was the application of the legal poor's half of the collections or of the kirk-session's half, or of both indiscriminately, that was in dispute.

CHAP. XV.

to ecstatic excitement so violent as to produce physical disorders, such as bleeding at the nose. On the occasion of the communion, a vast concourse, said to have numbered thirty thousand, assembled in the fields round the Church. For these a number of tables were provided, at which they communicated by relays, fourteen ministers assisting at the celebrations, which lasted until ten o'clock at night when Whitefield preached. The action was raised by a heritor who disapproved of these proceedings, and desired to restrain the kirk-session from applying the church-door collections in their furtherance. It was held that the kirk-session were not justified in applying part of the poor's funds in their hands (1) in providing communion forms, tables, and tablecloths; (2) in payment of rent for a preaching field; (3) in paying for damage done to a heritors' dyke adjacent to the preaching field; (4) in paying officers for attending to keep the peace on the occasion of the Sacrament, and (5) in payment of fees to the Presbytery clerk. On the other hand, the Court sustained the application of part of the funds (1) in erecting and repairing a tent for communion preaching; and (2) in payment of fees to the session clerk.

Ratio of the
Cambuslang
decision.

9. The rent of the field and the provision of communion furniture for the accommodation of strangers to the parish were clearly charges which fell to be disallowed, as did also the payment for damages done by this concourse. On the other hand, the provision of a tent, which is not, as is sometimes supposed, a marquee to accommodate worshippers, but a covered outside pulpit made of wood, was sanctioned. Outside preaching on the occasion of a communion was customary, and accordingly provision for it was regarded as legitimate. The session clerk's remuneration was allowed as being a proper parochial charge for which there was no other provision. The Presbytery clerk's fee was disallowed, probably because it was not parochial, although it was found that in respect of custom bygone did not fall to be sur-

charged. The custom has survived the decision, and the practice has ever since been to make this payment out of the fund. It may perhaps be doubted whether, in a country where even a statute can be abrogated by desuetude, an isolated decision outweighs a custom so old, so constant, and so universal.

10. In the Crieff case (*a*) the opinion is indicated by Lord Ivory that as regards their own half of the church-door collections the kirk-session had considerable latitude in the application of the fund, and were not restricted to its eleemosynary use. A similar opinion seems to be indicated by several of the Judges in the Linlithgow case (*b*). The same view was taken by Dunlop, and, as he indicates, this view was in accordance with general practice (*c*). In the absence of any express statutory direction, any question as to the purposes for which money voluntarily contributed by worshippers falls to be applied seems one peculiarly appropriate to be determined by custom, as it may be assumed that those who contribute intend their money to be applied in the way in which it has been in use to be applied in the past.

11. Kindred to the question as to the application of ordinary church-door collections was the question as to whether collections might be taken at the church doors for special purposes. The authority upon this matter is meagre. In the case of Neilston (*d*) it was found that the kirk-session were not entitled to collect every Sunday in plates separate from the poor's plates in order to defray the expenses of a litigation in which they had been engaged. This case, however, was obviously very special. The Lord Ordinary indicated an opinion that it was in accordance with law and practice to make special collections, although

Other authority upon the question.

Special collections.

(*a*) Cuninghame v. M'Ewan, 1854, 16 D. 511.

(*b*) Hardie v. Linlithgow Kirk-Session, 1855, 18 D. 37.

(*c*) Dunlop's Parochial Law, p. 71, note 1, and p. 401.

(*d*) Speirs v. Fleming, 1831, 9 S. 659.

it might be illegal to make these so often as to encroach upon the poor's fund. Lord Meadowbank has doubts upon this point. As appears, however, from the records of the General Assembly, that body has been in use to order collections to be made in parish churches for special purposes ever since the seventeenth century. This practice, unchallenged for two centuries, cannot, it is thought, now be called in question.

Present law
and practice as
to collections.

12. Such having been the somewhat uncertain state of the law in 1845, it is not surprising that the provision of section 54 of the Act of that year has occasioned some doubt and difficulty. The session are now entitled to apply the second or formerly legal poor's half of the collections in the same way as their own half. The whole fund may be applied for any purpose or purposes for which it was formerly legal to apply the kirk-session's half, but apparently not otherwise. Such having been the nature of the statutory provision, the somewhat uncertain understanding of the actual state of the law to which that provision was made applicable renders it of importance to consider what practice has followed upon the statute. The general practice has been to treat the whole fund as being at the disposal of the session within somewhat wide discretionary limits as to its application for relief of the casual poor, for the defrayment of expenses not otherwise provided for in connection with the conduct of Divine worship and the Sunday instruction of children, and for meeting the incidental expenses of the kirk-session. This practice has now obtained for nearly sixty years, since it was accepted as the interpretation put upon the statute of 1845 in relation to the then understanding of the law. In these circumstances it is thought that it is unnecessary to inquire how far prior *dicta* and decisions warranted the view adopted and acted upon, as the long practice following upon the Act of 1845 must be held to have determined the state of the law.

13. The question of the position of the church-door collections in parishes *quoad sacra* is one of some difficulty. In the Brechin case^(a) it was found that collections at a church to which the General Assembly had attached a district as a parish *quoad sacra* were part of the poor's fund. It is true that in this case the question was reserved as to the power of the General Assembly to erect such parishes. But the case was decided upon the express footing that the erection was valid; indeed more than one judge indicated the opinion that the case would have been otherwise decided had the place of worship been merely a chapel of ease in connection with the Established Church, without any parochial status as part of the Establishment. It was doubtless in view of this state of the law that it was found necessary to insert the special provision as regards church-door collections contained in the following paragraph of the 9th section of the New Parishes (Scotland) Act, 1844, by which the erection of parishes *quoad sacra* was provided for, viz.—

CHAP. XV.

Collections at church of parish *quoad sacra*.

7 and 8 Vict. c. 44.

“And the pew or seat rents of any such church as aforesaid may be expended and applied for the purpose of defraying the necessary expenses of a precentor, a beadle or kirk officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and not otherwise provided for, and for the purposes of upholding in due repair and improving the fabric of such church, or of the dwelling-house and offices of the minister, or for the relief of any person or persons who may have undertaken or become liable to uphold the same, or who may be liable for the endowment or stipend provided and secured for the minister of such church, and it shall be lawful to make collections at the door of any such church for any of the purposes aforesaid.”

This last provision was no doubt inserted to meet the difficulty that otherwise, under the case of Brechin, it might have been held to be illegal to make church-door collections for all or some of these purposes. The effect of the provision is to sanction such collections, but the provision does not appear to do more than to authorise the taking of special

(a) *Panmure v. Sharpe*, 1839, 1 D. 840.

collections for these purposes. It is silent as to ordinary collections not taken for any of these purposes. There appear, therefore, to be some grounds for holding that whilst there is no restriction upon the number of collections to be taken for statutory purposes, the proceeds of ordinary church-door collections in the church of a parish *quoad sacra* are held subject to the same trust as govern those of ordinary collections at the church of an old parish. The latitude of this trust, however, probably renders the question one of little practical importance.

SECTION III.—*Parish Charities.*

8 and 9 Vict.
c. 83.

14. By the 52nd section of the Poor Law (Scotland) Act, 1845, it was provided :—

“ Property held for benefit of poor to be administered by and vested in new Parochial Boards.—Where any property whatsoever, whether heritable or moveable, or any revenues, shall at the time of the passing of this Act belong to or be vested in the heritors and kirk-session of any parish, or the magistrates or magistrates and town-council of any burgh, or commissioners, trustees, or other persons on behalf of the said heritors and kirk-session, or magistrates, or magistrates and town council under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh, it shall, from and after a time to be fixed by the Board of Supervision, be lawful for the parochial board of each such parish or of the combination in which such parish or burgh may be respectively, to receive and administer such property and revenues, and the right thereto shall be vested in such parochial board ; and the said heritors and kirk-session, magistrates, town council, commissioners, trustees, or other persons, are hereby authorised and required either to continue to hold all such property and revenues for the behoof of such parochial board, or to make, grant, subscribe, and deliver such dispositions, assignations, and conveyances of all such property and revenues as may be necessary to enable such parochial board to administer the same for behoof of the poor of such parish or combination.”

15. There are a number of cases (*a*) upon the construc-

(*a*) *Liddle v. Bathgate Kirk-Session*, 1854, 16 D. 1075 ; *Hardie v. Linlithgow Kirk-Session*, 1855, 18 D. 37 ; *White v. Kirk-Session of Kinglassie*,

1867, 5 M'P. 869 ; *Flockhart v. Aberdeen Kirk-Session*, 1869, 8 M'P. 176 ; *Pencaitland Kirk-Session v. Wood*, 1893, 21 R. 214.

tion of this provision, some of which are not very easily reconcilable as regards the interpretation to be put upon particular facts, though there does not appear to be much difference as regards the principles to be applied. The result of the cases may be summarised in the following propositions:—

CHAP. XV.

Judicial construction of foregoing provision.

(A.) Where a fund was mortified or invested in favour of the kirk-session for behoof of the poor of the parish, the term poor is open to construction, and does not necessarily mean the legal poor in the sense of the above-quoted section of the Act. Where, however, the kirk-session were in use to act as the administrators of poor relief on behalf of themselves and the heritors, there appears to be a presumption that a fund in their hands for behoof of the poor is for behoof of the legal poor.

(B.) In construing the term “poor” in relation to such a mortification or investment, regard must be had (1) to the source of the fund; (2) to the precise terms and the circumstances of the mortification and investment; and (3) to the history of the administration and application of the fund.

(C.) Where it appears that the fund, though bequeathed to or invested in the name of the kirk-session, was so bequeathed or invested in favour of the kirk-session as the *de facto* administrators of parochial relief in the parish—the heritors not concerning themselves therewith—the fund will be held to be “vested in the heritors and kirk-session” within the meaning of the above section of the Act. The participation of the heritors in the subsequent administration of the fund will be corroborative of the theory that this is the nature of the fund, but even in the absence of any evidence of such participation, other circumstances may be sufficient to make good that theory.

(D.) Where a fund had been vested in and administered by the kirk-session alone, for behoof alike of the occasional and of the legal poor, it did not fall to be handed over to the

Parochial Board under this section, although, as will be presently pointed out, it now falls within the scope of the Local Government (Scotland) Act, 1894 (*a*).

57 and 58 Vict.
c. 58.

16. Section 30 of that Act provides that where a property is vested in the kirk-session of any parish wholly or mainly for the benefit of the inhabitants of the parish, and is neither an ecclesiastical nor an educational charity, either (1) the kirk-session may make over the administration of the property to the Parish Council, or otherwise, the kirk-session may appoint three trustees to aid in the management of the property, along with such number of trustees appointed by the Parish Council as the Local Government Board may approve. These provisions with reference to the appointment of trustees do not apply to any charity until the expiration of forty years from the date of its foundation. With reference to these provisions an ecclesiastical charity is thus defined (section 54):—

“The expression ‘ecclesiastical charity’ includes a charity the endowment whereof is held for some one or more of the following purposes:—

- (a) For theological instruction or for the benefit of any theological institution; or
- (b) For the benefit of any ecclesiastical person or officer as such; or
- (c) For use, if a building, as a church, chapel, mission hall, or room, or Sunday school, or otherwise by any particular church or denomination; or
- (d) For the maintenance, repair, or improvement of any such building as aforesaid, or for the maintenance of Divine service therein; or
- (e) Otherwise for the benefit of any particular church or denomination, or of any members thereof as such.

Provided that where any endowment of a charity, other than a building held for any of the purposes aforesaid, is held in part only for some of the purposes aforesaid, the charity, so far as that endowment is concerned, shall be an ecclesiastical charity within the meaning of this Act.”

17. The last proviso is a perplexing one. It has been

(a) See Appendix, p. 674.

suggested that as a building cannot be apportioned and a fund can, the intention was that where a building is held partly for an ecclesiastical purpose the charity should be treated as ecclesiastical, but that where a fund of money is so held the same should be apportioned. This surmise gains some confirmation from the circumstance that in the corresponding clause in the English Act^(a) (upon which the present clause was modelled), there is added to an identical provision a direction that the Charity Commissioners are to "apportion" an endowment so circumstanced. If apportionment was intended, the clause has been blundered, for "that endowment," which is to be treated as ecclesiastical, refers back to "any endowment" which may be in part ecclesiastical. The provision has been generally understood in Scotland to mean that, where any one of the purposes of a charitable fund is ecclesiastical, the Act does not apply to the fund.

18. Under the foregoing provisions it was found that a fund invested by the kirk-session in the eighteenth century, from the poor's box funds for behoof of the kirk-session and the poor of the parish, was not an ecclesiastical charity, and fell to be administered under the Act^(b). In another case^(c) it was held that a bequest to the kirk-session for behoof of "the poor members of Jesus Christ" was not an ecclesiastical charity. Construing the corresponding section^(d) of the Local Government Act, 1893, the English Courts have held that the expression "as such" means "in virtue of their being members of the church and not otherwise," that "ecclesiastical charities" are not confined to charities for the spiritual or religious benefit of a church, but include eleemosynary charities; that a preference given to those most constant "in their attendance on the public service of the church" does not render the charity "ecclesi-

CHAP. XV.

Import of foregoing definition.

Cases under 1894 Act.

(a) Local Government Act, 1894, 56 and 57 Vict. c. 73, s. 75.

(b) Bo'ness Parish Council v. Bo'ness Kirk-Session, 1900, 2 F. 661.

(c) Parish Council v. Kirk-Session of Auchtergaven, 1901 (Lord Low Poor Law Magazine, vol. 11, p. 546.

(d) S. 75.

CHAP. XV. "astical," but that a limitation to those who have for five years attended the parish church and partaken communion does so render it (a).

SECTION IV.—*The Poor's Roll.*

Duty of kirk-session in regard to poor litigants.

19. Another function of the kirk-session of a civil character is in connection with inquiries and certificates as to the circumstances of litigants who apply for the benefits of the poor's roll. An attestation by the minister and elders is required by the Court as to the circumstances of the applicant. This subject, however, does not properly belong to parochial law. It will be found fully treated of in Chapter XVII. of Mr. Duncan's second edition, and in Mair's Digest of Church Laws.

SECTION V.—*Dues exacted by Kirk-Session (b).*

Rule in regard to dues.

20. Certain dues (once much more numerous than in recent years) have been in use to be levied by kirk-sessions or by their officers with their authority. The dues so levied by inferior officers are noticed in the next chapter, where some cases are cited. The rules in regard to such dues appear to be as follows. No due is leviable for any service which by law the kirk-session or its officer is bound to render unless the same is supported by immemorial usage, which usage, if it subsists, determines both the liability and the amount. Where the service is a voluntary one, the fee is a matter of private arrangement.

SECTION VI.—*Session-House.*

Session-house and vestry generally combined.

21. In the majority of parishes, the same room in connection with the church serves the double purpose of session-house and vestry. It is the meeting-place of the session and

(a) Ross Charity; Perry's Alms-houses, 1899, 1 Ch. 21. It was pointed out in this case by Lindley, L.J., ecclesiastical charity is not defined by the statute, but is merely

said to "include" certain things. A reference to Hansard shows that this expression is deliberate, "means" having been struck out of the Bill.

(b) See further pp. 611, 616, 631.

the retiring-room of the minister. As is pointed out by Mr. Duncan, the provision of such accommodation is not enjoined either by the Act of Privy Council in 1563 or by the statute 1572, c. 54 (*a*), and at one time churches were built without vestries, the manse being close to the church. There can be no doubt, however, that the Court would not sanction any proposal of the heritors to build a church without providing a vestry, a vestry being now, according to the custom and practice of all religious denominations, an invariable adjunct of a church.

(*a*) The case of *Hill v. Wood*, 1863, 1 M'P. 360, touches the matter but not the point.

CHAPTER XVI.

ON INFERIOR CHURCH OFFICERS.

CHAP. XVI.

Scope of
chapter.

1. The persons included under the title of this chapter are the beadle, the precentor, and the session clerk, and the following remarks apply to their appointment, functions, and remuneration.

SECTION I.—*The Beadle.*

A threefold
office.

2. The three functions of service as kirk-session officer, minister's man or personal attendant on the minister at church, and doorkeeper of the church, are usually discharged by one and the same person, and this person is known as the beadle (*a*). Ancient and universal as is the office, important as are its functions, and secure as is its place in literature, the legal authority as to the office, its subdivisibility, the right of appointment, and the sources of emolument are exceedingly meagre.

Duties of
beadle as
session officer
and minister's
man.

3. In his capacity as session officer the beadle is required when necessary to cite persons to appear before the kirk-session; to be in attendance on its meetings; and *qua* messenger to perform various minor duties in connection with the despatch of its business. In his capacity as minister's man the beadle is in use to attend on the minister at the diets of public worship within the church; to place in and remove from the pulpit his Bible and Psalm-book; to provide water and napkins for baptisms; to assist in arranging the communion tables on the occasions when the Lord's Supper is dispensed; and to superintend other arrangements

(*a*) This term seems to be derived either from *bedellus*, i.e. messenger; or from the Saxon word *bydel* or *baedel*, from *bydde* to publish, or *biddan* to order.

connected with the celebration of public worship. The right of the kirk-session to appoint its own officer is undoubted, and in practice it is believed this official always discharges the duties of minister's man. It may be taken therefore that the appointment of session officer and minister's man is with the kirk-session (*a*).

4. Under the Canon law the doorkeeper, styled *ostiarius*, belonged to a regular although an inferior ecclesiastical order, the members of which were formally ordained, and specially constituted the permanent guardians of the church. As such they were charged with the general custody of the building; with the duty of opening and shutting the doors at stated times, according to the hours and diets of Divine service; and with that of preserving order and decorum within it, particularly during the celebration of public worship (*b*).

5. By Scots law the doorkeeper is entrusted with the keys of the church; and it is his duty to open the building for the celebration of public worship on Sundays and on other appointed occasions. It is also his duty to afford to the parishioners, when duly required to do so, access to the building for such purposes as are not inconsistent with the design of and uses to which it may legally be applied. He ought likewise to be in attendance at the church during the diets of worship, and at the termination of the service to open the doors to allow the congregation to disperse in a quiet and orderly manner, and thereafter to shut up the building until the next occasion of its legitimate use.

6. It has been laid down (*c*), as decided by the case of Elgin (*d*), that the magistrates in a burghal parish, and conse-

Doorkeeper
under Canon
law.

Duties of door-
keeper by
Scots law.

In whom his
appointment
vested.

(*a*) The cases *Magistrates v. Kirk-Session of Gorbals*, 1823, 2 S. 194, and *Stewart v. Kirk-Session of Gorbals*, 1823, 2 S. 564, are special and inconclusive, and cannot be relied upon as establishing anything in the matter.

(*b*) See Van-Espen, *De Instit. et Off. Canon.* Pt. ii. c. 3, s. 2.

(*c*) Per Lord Medwyn in *Kirk-Session of St. Andrews v. Town-Council of Edinburgh*, 1835, 13 S. at p. 395.

(*d*) *Magistrates v. Minister of Elgin*, 1740, M. 7916 and 13,124, and Elchies, *Kirk-Session*, 1. The reports of this case are unsatisfactory. Elgin is a landward-burghal parish,

CHAP. XVI.

quently the heritors in a landward parish, are entitled to appoint the "beadle." It appears, however, that by this term, as there used, was meant the doorkeeper of the church; or at least that the duties of this officer were united in the person of the individual referred to under the appellation of beadle, and in fact superseded those of session officer. For it was *qua ostiarius* that the doctrine in question was held to apply to the "beadle." The reason why the heritors have the appointment of the doorkeeper is, that as the characteristic duty of this officer is the guardianship of the church so law confers on those parties who are bound to maintain the building, and whose property it may, in a certain sense, be said to be, the right of appointing such officer.

Church keys
held by beadle
for minister or
heritors.

7. The independent interests of the clergyman on the one hand, and of the heritors or magistrates on the other, in connection with the building, have suggested the question whether, *qua* custodier of the keys of the church, the beadle—being doorkeeper—represents or acts on behalf of the one party or the other (*a*). The opinions on this subject seem to recognise that, *quoad* the use of the church for public worship or the services of religion, the minister enjoys a constructive right of possession of the building commensurate with its application to these uses, and that to this extent the beadle holds the church keys for or as representing him. While, as regards the general custody of the building, with a view to its preservation and exemption from uses inconsistent with its sacred character, the right of possession of the keys belongs to the heritors in a landward and to the magistrates in a burghal parish; and that to a corresponding extent the beadle holds the church keys for or as representing them.

8. The position of the beadle as doorkeeper appointed by

and it is difficult to see how the Magistrates could have the right of appointment, to the exclusion of the other heritors.

(*a*) See per Lords Meadowbank and Medwyn (who adopt different views

on this subject) in Kirk-Session of St. Andrew's Parish *v.* Magistrates of Edinburgh, 1835, 13 S. 394-5. See also per Lord Meadowbank in Mac-naughton *v.* Magistrates of Paisley, 1835, 13 S. at p. 434.

the heritors, and as session officer, and minister's man appointed by the kirk-session, is analogous to that of the keeper of the Sheriff Court-House appointed by the County Council, and the bar officer appointed by the Sheriff. In theory, the offices are distinct, and each authority might appoint a different person, but in practice there is generally an understanding, express or tacit, that the same person shall be appointed. In the case of the doorkeeper a formal appointment by the heritors is unusual. The person appointed session officer by the kirk-session steps into the place with the acquiescence of the heritors.

9. Although the appointment of doorkeeper is vested in the heritors, it does not seem to be decided whether they are at common law liable in the burden of providing a salary for him. As has already been indicated, the same person almost universally combines all three offices, and this person has been in use to receive remuneration in the form of customary dues levied by the kirk-session on the occasions of marriages and baptisms (*a*). He is also often gravedigger, and receives remuneration in that capacity. In some cases the heritors give the beadle a small salary, in others they maintain a house for him. It is thought that if the heritors were to insist upon appointing a person other than the session officer to act on their behalf as doorkeeper, they would be bound to provide him with a salary. He would have no other source of emolument, and it cannot be supposed that he would perform the duties for nothing. As session officer the beadle frequently receives a small salary from the church-door collection fund, and there is authority in support of such a payment (*b*).

(*a*) The rubric of the report in *Beveridge v. Bayne*, 1765, M. 8014, seems to imply that the beadle is entitled to demand, as a perquisite of his office, dues imposed by the kirk-session, where these have been immemorially in use to be paid. It is to be noted, however, that the

person who here sued for these dues acted as the precentor and session clerk, as well as beadle.

(*b*) *Heritors v. Minister of Cam-buslang*, 1752, Mor. 10,570. Here it was the session clerk, but the principle is the same.

CHAP. XVI.

Private officer,
and removable
at pleasure.

10. The beadle is not a public officer, but the private servant of his employers, and, unless when it is otherwise provided by the terms of his engagement, he is liable to be removed at the pleasure of those who appointed him, upon reasonable notice given.

SECTION II.—*The Precentor.*

Duties of pre-
centor.

11. The principal duty of the precentor, as his name imports, is to lead the congregation in singing at the diets of public worship within the parish church. He also sometimes proclaims the marriage banns, and makes intimations of heritors' meetings called for parochial ecclesiastical purposes, but it is now the usual, as it certainly is the appropriate, practice for the minister to make these intimations from the pulpit.

Appointment,
in whom
vested.

12. At common law, the right of appointing the precentor seems to belong exclusively to the kirk-session (*a*). But there is some authority to the effect that, by voluntary agreement, judicial arrangement, or private endowment, this body may be deprived either of the entire or otherwise of the exclusive exercise of the right in question. Thus, in the case of Linlithgow (*b*), where the election of the precentor was, under a deed between the kirk-session and the town, declared to be in the former, with *advice* and *consent* of the magistrates, it was held that without their concurrence the kirk-session could not make a valid appointment. In another instance (*c*) the right of appointing, *inter alios*, precentors in the parish was by decree of the Teind Court vested in "the bailies, preses, and managers of the public funds" of the parish of Gorbals. Again, in the case of Elgin (*d*), where a

Instances of
special right of
appointment.

(*a*) Nisbet *v.* Kirk-Session of St. Cuthbert's, 1773, M. 8016, and 5 Br. Supp. 599. See also Anderson *v.* Kirk-Session of Kirkwall, 1779, M. 8017 and 13,137, and 5 Br. Supp. 600.

(*b*) Magistrates *v.* Kirk-Session of Linlithgow, 1739, M. 2304.

(*c*) Magistrates *v.* Kirk-Session of Gorbals, 1823, 2 S. 194, 564.

(*d*) Magistrates *v.* Minister of Elgin, 1740, M. 7916 and 13,124; also per Lord Ordinary Mackenzie in Hislop *v.* Figgins, 1863, 1 M.P. at p. 323.

grant by the Crown was made to the town of certain emoluments for the endowment of a music master, who was also to act as precentor, it was held that his appointment lay with the town and not with the kirk-session.

13. The precentor, like the beadle, is a private officer; and, unless it be otherwise conditioned in the contract of engagement, he holds his situation not *ad vitam aut culpam*, but *durante bene placito* of his employers. Hence he may be removed at the pleasure of the kirk-session (*a*). Precentor a private officer.

14. It has been ruled that neither by statute nor at common law are the heritors bound to provide a salary for the precentor (*b*). No such burden seems to be imposed on them by general custom; and if in any case they are liable therein, this seems due either to immemorial usage to this effect in a particular parish (*c*), or to a special undertaking in the matter on the part of the heritors. In the case of Dunfermline (*d*), it was found that the fees paid on the occasion of marriages and baptisms belonged to the precentor and not to the session clerk. While the reporter observes of this decision that it must have proceeded on specialties, as "the contrary seems to be the general rule," it is understood that precentors are in some parishes in use to receive fees for the proclamation of banns, the amount of which in some instances is considerable (*e*). The salary of the precentor is paid out of the ordinary church-door collections (*f*), or out of special collections made for the purpose either at the church door or otherwise. His salary, whence derived.
Case of Dunfermline.

15. In many parishes the precentor or leader of singing has Organist.

(*a*) *Anderson v. Kirk-Session of Kirkwall*, *supra*, M. 8017 and 13,137.

(*b*) *Hislop v. Figgins*, *supra*, 1 M'P. 321, as decided by Lord Ordinary Mackenzie, whose judgment was acquiesced in.

(*c*) *Ibid.* per Lord Ordinary Mackenzie. See *Traill v. Dangerfield*, 1809, 8 M'P. 579, a narrow decision, the soundness of which may perhaps be doubted.

(*d*) *Marquis of Tweeddale v. Kirk-Session of Dunfermline*, 5 Br. Supp. 600.

(*e*) It is, however, to be remarked that, as the same person often acts as precentor and session clerk, it is often difficult to determine whether a particular amount of his remuneration is payable to him in the former or in the latter capacity.

(*f*) See *ante*, p. 595.

CHAP. XVI.

been superseded by the organist. Such rules of law as applied to the former it is thought apply to his successor.

SECTION III.—*The Session Clerk.*

Session clerk
appointed by
kirk-session.

16. The session clerk is peculiarly the servant of the kirk-session. The right of appointment belongs to this body exclusively. Such was the view expressed in the case of Elgin (*a*), where it was “thought inconsistent that it should “be in the power of the Crown to confer the office or to grant “to any other the power of conferring it.” A judgment to a similar effect was pronounced in a later case (*b*). As both these cases related to royal burghs, where the magistrates paid the session clerks’ salaries, they are very clear authorities in support of the above doctrine. To a similar effect is the case of St. Cuthbert’s (*c*), where the Court unanimously refused a suspension at the instance of the heritors of an appointment of a session clerk (and precentor) by the kirk-session exclusively.

Registering
births, &c.,
transferred to
registrars.

17. Prior to the date at which the 17 and 18 Vict. c. 80, came into operation, the important duty of registering births, marriages, and deaths in Scotland was committed to and for the most part performed by the session clerks throughout the country, and fees were payable to them both for making the relative entries in and for extracts thereof from the parochial registers. From various causes, however, these registers were in some parishes imperfectly kept or preserved; and by the Act mentioned the duty and right of registering these occurrences have been transferred to the statutory “registrars” —an arrangement which has indirectly but effectually deprived session clerks of one important source of their former emoluments.

18. Among the ordinary duties now devolving on the

(*a*) *Magistrates v. Minister of Elgin*, 1740, M. 7916 and 13,124.

(*b*) *Kirk-Session v. Magistrates of Dundee*, 1761, 5 Br. Supp. 599.

(*c*) *Nisbet v. Kirk-Session of St. Cuthbert's*, 1773, M. 8016.

session clerk may be mentioned those of attending the meetings of the kirk-session, and taking accurate notes of the proceedings or business transacted thereat, and from these notes or otherwise framing minutes of the meetings, and engrossing the same when, and as approved of, and in their order of date, in the sederunt books of the kirk-session. The custody and control of these sederunt books and the records generally of the kirk-session devolve on their clerk, whose duty it is to keep them safe from loss or mutilation, or alteration of any kind. It is not proper for him to exhibit the kirk-session's books or records to third parties outwith his own presence, unless under circumstances which render all tampering with their contents impossible. On the other hand, the session clerk is bound to exhibit these records to the kirk-session when required to do so; and the parish minister, *qua* moderator of the body, seems entitled to obtain access to them "at all times not inconsistent with the proper discharge of the clerk's duty" (a).

19. Should it, from inspection or otherwise, appear that the sederunt books or records of the kirk-session have been kept by the clerk with culpable carelessness or irregularity, the kirk-session seem entitled, pending a formal inquiry into the matter, to take and keep possession of these documents—committing the temporary custody of them to the minister or some other member of the body. The adoption of this course seems warrantable on presumptive evidence merely of intentional neglect or misconduct on the part of the clerk, and although no decree of deposition or even suspension from office has been pronounced against him. To this effect is the case of Moneydie (b). For although here the kirk-session had pronounced a deliverance deposing their clerk, this deliverance was on technical grounds (at first), recalled by the Presbytery before the petition to the Sheriff was disposed of.

Custody of
records on mis-
conduct of
session clerk.

(a) Per Lord President Boyle in
Porter v. Auld, 1850, 13 D. at p. 271.

(b) *Ibid.*

CHAP. XVI.

Nevertheless, the Court unanimously held that, pending the judicial inquiry into the session clerk's conduct, the records of the kirk-session should remain in the custody of the kirk-session and not in that of their clerk.

Ad interim
appointment.

20. Kirk-sessions form one of the four classes of Church courts recognised by law. As such they have a recognised legal status, and *qua* court each kirk-session requires a clerk to register and give out extracts of its deliverances and decrees. Accordingly, when from death, dismissal, resignation, or suspension the office of the session clerk is vacant or in abeyance, a clerk *ad interim* is appointed—the person selected being in practice very frequently the parish minister.

Session clerk a
public officer.

21. *Qua* Church judicatory the kirk-session possesses the status of a public body, and its clerk, who holds a position of public trust, is probably entitled to be regarded as a public officer. A doctrine to this effect was laid down by one of the Judges in the case of Arbirlot (*a*), and although the ground upon which apparently it was there rested is unsatisfactory (*b*), the doctrine itself is probably correct (*c*), and may possibly be regarded as a corollary from the public character and judicial functions of the body whose servant the session clerk is (*d*). As the official of a court which is recognised by law, the clerk of a kirk-session of the Established Church may make and give out extracts from its records, which will be treated as equivalent to the original. On the other hand, and in contrast to this rule of law, the clerk of a kirk-

May give out
extracts.

(*a*) Goldie *v.* Christie, 1868, 6 M'P. 541.

(*b*) Per Lord Deas, who rests the doctrine that the session clerk in that case was a public officer on the fact that he was specially elected to the office *ad vitam aut culpam*. His Lordship's words are: "The pursuer was elected to the office of session clerk *ad vitam aut culpam*. He *thus* became a public officer, having important duties to perform to the public."—*Ibid.* 6 M'P. 544, top. The soundness of this reasoning is questionable, as it seems to make the

test of the public character of the office dependent on the appointment to it being one *ad vitam aut culpam*.

(*c*) At the same time, see the argument in Anderson *v.* Kirk-Session of Kirkwall, 1779, M. 8017 and 13,137, where the Court's judgment does not necessarily contradict the proposition there advanced, that the session clerk is a private officer merely.

(*d*) The clerk of the Kirk-Session is an officer recognised by the Act 1696, c. 26, where he is mentioned in conjunction with "the readers."

session of a dissenting Church cannot give out extracts from their records that will bear faith in judgment (a).

CHAP. XVI.

22. The appointment of the session clerk—as already stated—rests with the kirk-session alone (b); and although a public officer—assuming such to be his true character—he at common law holds the office not *ad vitum aut culpam*, but *durante bene placito* merely. Accordingly, the doctrine appears to be well fixed that the session clerk is removeable at the pleasure of the kirk-session, his employers. It was at one time doubted whether they can dismiss him arbitrarily, *i.e.* without any cause assigned; or whether they do not require to assign some cause, though not necessarily amounting to *culpa*. This latter view is countenanced by the grounds of judgment in *Harvey v. Bogle* (c), where, adopting a middle course in the matter, the Court found the office of session clerk to be neither for life nor absolutely during pleasure, but that the person holding it was removeable summarily for reasonable cause, but without the necessity of a charge of malversation. This qualification of the right of summary dismissal, however, was disregarded in the case of *Dunsyre* (d), and apparently also in that of *Kirkwall* (e); and, in the case of *Moneydie* (f), the doctrine was distinctly expressed that the session clerk is removeable at pleasure, with or without cause. Hence, the law on the subject is that, in the absence of stipulation to the contrary, the session clerk is,

Removeable at pleasure.

Whether arbitrarily or not?

(a) See *Mathers v. Lawrie*, 1849, 12 D. 433.

(b) *Nisbet v. Kirk-Session of St. Cuthbert's*, 1773, M. 8016, and 5 Br. Supp. 599, and there *per curiam*, who lay down the law to be, that while the election of the schoolmaster is by the heritors, that of the session clerk and reader is by the session.

(c) 1756, M. 8012 and 13, 126. As justifying this “middle course,” the Court founded on the Magistrates of *Montrose v. Strachan*, 1710, M. 13, 118, and *Foulis v. Vestry of Blackfriars Wynd Chapel*, 1774, M.

6581. As the former case, however, applied to the dismissal of a parish schoolmaster, and the latter depended on the terms of the deed of foundation of the chapel, neither was an authority much in point.

(d) 1777, 5 Br. Supp. 600.

(e) *Anderson v. Kirk-Session of Kirkwall*, 1779, M. 8017 and 13, 137, and 5 Br. Supp. 600.

(f) *Porter v. Auld*, 1850, 13 D., and there *per Lord Ordinary Cuninghame*, p. 270, approving of the doctrine stated in the text, as laid down by Sheriff Whigham.

CHAP. XVI.

like the precentor, removeable by his employers arbitrarily, *i.e.* without any cause assigned on reasonable notice given.

Offices held by
session clerk.

23. The person who holds the appointment of session clerk frequently unites in his person other offices. Thus he was often, and still sometimes is, also the schoolmaster, the precentor, the registrar, or the heritors' or Parish Council's clerk. It is not always easy to determine what the special source of his emoluments *qua* session clerk distinctively is (*a*)—his income being sometimes made up of fees or salary derived from various offices held in combination. Apart from any stipulated salary out of the kirk-session funds (*b*), the income derived by the session clerk *qua* such seems formerly to have included, as peculiarly belonging to him, the dues payable for the registration of births or baptisms and proclamations of banns. Thus, in the case of Avondale (*c*), the minister, who acted apparently as interim session clerk, drew these dues as pertaining to the office.

Dues payable
to him.

Case of
Fortingall.

24. Again, in the case of Fortingall (*d*), the dues in question were treated as a perquisite of the office of session clerk, and the right to levy them was recognised as a civil right. Here a portion of the parish was allocated as a Parliamentary district, called Kinloch Rannoch, under 5 Geo. IV. c. 90, and subsequently erected into a (so-called) *quoad sacra* parish under the General Assembly's Act of May 1833. The minister of this district parish appointed the advocator, Campbell, as session clerk, and he made proclamation of banns and registered baptisms, for which he exacted dues. The session clerk of the parish proper thereupon applied by petition to the Sheriff

(*a*) In *Hamilton v. Minister of Cambuslang*, 1752, M. 10,570, Elchies, *Kirk-Session*, No. 2, and Notes, his Lordship says: "I know no salary or 'emoluments he has *qua* session clerk if he is not schoolmaster."

(*b*) *Hamilton v. Minister of Cambuslang*, *cit.*

(*c*) *Hamilton v. Scott*, 1797, M. 7630. See also *Beveridge v. Bayne*, 1765, M. 8014.

(*d*) *M'Donald v. Campbell*, 1836, 9 Jur. 5.

to interdict him from so doing. The Sheriff granted interdict, and, on an advocation, his judgment was affirmed (*a*).

25. Under an Act of Assembly (1880, Act 8) (*b*), the fee for proclamation of banns is not to exceed two and sixpence. This Act may not, as has been suggested, affect the civil right of the session clerk to exact a higher fee where custom sanctions it. But as the session clerk is the servant of the kirk-session, and holds office at their pleasure, it is thus in the power of that body to enforce compliance with the Act of Assembly, and it is their ecclesiastical duty to do so (*c*).

(*a*) In connection with the subject of the session clerk's right to levy or vindicate the payment of particular dues as the perquisites of his office, the following two cases, decided in the Sheriff Courts of Renfrewshire and Perthshire, may be mentioned,

viz., Minister of Kilmalcolm *v.* M'Donald, 1861, 3 S.L.J. 128; and Scott *v.* Bell, 1867, 2 Poor Law Mag. 354.

(*b*) Cook's Styles, 41.

(*c*) See further in regard to banns, *infra*, p. 632.

CHAPTER XVII.

ON COMMUNION ELEMENTS.

CHAP. XVII. SECTION I.—*Introduction of Communion Element Allowance.*

Act 1572, c. 54. 1. The first statutory provision on this subject occurs at the close of the Act 1572, c. 54, "anent the reparation of the " paroche kirkis," which, *inter alia*, ordains the "persones of " all paroche kirkes within this realme to furnish bread and " wine to the communion, how oft the samin sall be ministrat " within the samin kirkes."

"Persones" means parsons.

2. It has been suggested that the term "persones" here employed may mean parishioners (*a*). This interpretation, however, is not consistent with the phraseology adopted in previous clauses of the Act, where the word "parochiners" is used when parishioners are meant; nor is it reconcileable with the distinctive use of the term "persones" in our law language at an early period as synonymous with "parsons" (*b*). These considerations lead to the conclusion that by the word "persones" in the statute in question is meant parsons. Such is the view adopted by Erskine (*c*), who considers that the burden of furnishing communion elements was by the Act exclusively imposed on the "few ministers who were " proper parsons or beneficiaries," as opposed to the bulk of the Reformed clergy, who were stipendiaries, and who, down to 1617, were provided for out of the "thirds."

This Erskine's view.

Grounds on which it rests.

Under 1617, c. 3. SECTION II.—*Modification of Communion Element Allowance.*

3. The Act 1617, c. 3, makes no special reference to com-

(*a*) Mack. Obs. p. 185.

(*b*) Thus—not to mention other instances—the terms "persones" and "person" are undoubtedly used as meaning "parsons" and "parson"

in the Act 1563, c. 72, passed within eleven years before the one in question.

(*c*) Ersk. ii. 10, 50. Connell, Teinds vol. i. p. 118.

munion elements; and as a general rule it would seem that the Commissioners acting under it did not modify any sum specially in name of such allowance, although their decrees frequently bore that the amount of stipend awarded to the minister was under burden of his furnishing communion elements (*a*). In certain instances, however, special sums for communion elements were awarded, or “eiked” to the amount of stipend modified to the minister, and payable to him by the heritors (*b*). Sometimes “the minister, present and to come,” was “holden as astricted to furnish” the elements out of the *cumulo* stipend modified as often as the communion should be celebrated (*c*). In one case, the patron was taken bound to provide the allowance in question (*d*); while in another—that of Dunbar—the burden was, with consent of the magistrates on behalf of the community, imposed on the town (*e*).

CHAP. XVII.

Instances of
modifications.

4. The principle upon which the Commissioners under the Act 1617, c. 3—in the absence of special warrant to this effect in the statute—acted in awarding the allowance in question was probably that indicated by Lord Meadowbank in the case of Prestonkirk (*f*), viz., that they regarded tithes as subject to allocation not merely for the leading object of providing minister’s stipend, but also for subordinate pious purposes, among which that of supplying the elements to be used in the celebration of the Holy Communion was naturally included.

Principle
adopted.

5. The Act 1641, c. 30, contains the first statutory provision in reference to furnishing communion elements. The Commissioners were authorised and directed “to set down a

Powers under
1641, c. 30.

(*a*) See Connell, Tithes, vol. i. p. 119, and vol. ii. Appx. xxxii., where a list of their decrees is given.

(*b*) Cases of Etterick, 1618, and Wigton, 1618, *ibid.* vol. i. p. 119.

(*c*) Cases of Kincardine O’Neil, 1618, and Wardlaw, 1618, *ibid.*

(*d*) Case of Cullen, 1618, *ibid.* vol. ii. Appx. xxxii.

(*e*) Case of Dunbar, 1618, *ibid.* See Buchanan *v.* Magistrates of Dunbar, 1866, 4 M’P. 1023, and 1869, 7 M’P. 576.

(*f*) See per Lord Meadowbank in Minister of Prestonkirk *v.* Earl of Wemyss, 1808, M. *Stipend*, Appx. 6; *affd.* 1808, 5 Paton, 210. See Connell, Tithes, vol. ii. Appx. p. 352,

CHAP. XVII. — “solid order, and take course for furnishing the elements to
 “the communion twice in the year, or oftener where they
 “are not provided at all, or not sufficiently provided.” This
 statute—along with various other statutes—was rescinded
 at the Restoration. To none of the subsequent Parliamentary
 Teind Commissioners was any express power given to appor-
 tion out of tithes any provision for communion elements. A

Act 1707, c. 9. similar remark applies to the provisions of the Act 1707, c.
 9, transferring the functions of these Commissioners to the
 Court of Session. Notwithstanding this, the right and power
 to modify allowances out of teinds—surplus teind existing—
 has been all along recognised and uninterruptedly exercised.

Powers under
 1633, c. 19.

6. The nearest approach to a delegation to the Parlia-
 mentary Commissioners of power to the above effect occurs
 in the Act 1633, c. 19, in these words,—“And sicklike, with
 “power to them to appoint and provide for such other pious
 “uses in each parochin as the estate thereof may bear.” The
 powers generally conferred by this statute in the matter of
 stipend were renewed by the Act 1661, c. 61, which likewise
 contains a clause in the precise terms just quoted; and it is
 under authority of this clause that the Teind Court at the
 present day burdens “the tithes with the expense of the
 “communion elements”(a).

Renewed by
 1661, c. 61.

SECTION III.—*Amount of Communion Element Allowance awarded.*

Communion
 allowance
 separately
 modified.

7. The course usually adopted by the Commissioners
 under the Act 1617, c. 3, of awarding a *cumulo sum qua*
 stipend to the minister, out of which he was to provide
 communion elements, without specifying in the decree how
 much thereof was applicable to the latter object, was gradu-
 ally discontinued; and in modifying stipends under the

(a) Per Lord Meadowbank in Minis-
 ter of Prestonkirk v. Earl of Wemyss,

supra; see Connell, Tithes, vol. ii. p.
 352.

relative Acts passed in 1633 (*a*) and subsequent years, the Parliamentary Commissioners were in use to distinguish in their decrees between the amount allocated to the minister as stipend, and that due by the heritors as communion element allowance. This practice was continued by the permanent Teind Commissioners under the Act 1707, c. 9, and is that followed at the present day by the Teind Court.

8. Between the Restoration and the Union the communion element allowance ranged from 40 to 50 merks (*b*), and it appears that even after the Act 1641, c. 30, was rescinded, and that of 1661, c. 61, was passed, ministers seem to have occasionally founded on the former statute as their warrant for claiming a sum for communion elements (*c*). The amount just mentioned continued for some time after the Union to be that awarded by the Teind Commissioners under 1707, c. 9, when a little after the middle of last century £100 Scots, equal to £8 : 6 : 8 sterling, came to be the recognised maximum allowance (*d*). This sum may now be regarded as the minimum amount awarded.

9. In fixing what in a particular case the amount is to be, the Teind Court recognise as the governing element the population of the parish. In some instances remarks have fallen from the Bench which might imply that the size of the communion roll, and the number of times a year the sacrament is celebrated, are also important circumstances. This may to some extent be true; but the Court is not inclined to give much weight to either circumstance, save in those instances where the case is a doubtful one in reference to the extent of the claim as regulated by the test of population. In modifying the communion element allowance accordingly, as in fixing the requisite size of the parish

(*a*) 1633, cc. 8, 15 and 19.

(*b*) Connell, Tithes, vol. i. p. 383.

(*c*) Minister of Glenmuick, 1661; and Minister of Eastwood, 1669.—*Ibid.*

(*d*) Minister *v.* Heritors of Jedburgh, 1777, 5 Br. Supp. 418, and the case of Paisley there mentioned.

Amount from the Restoration to the Union.

From the Union till middle of last century.

Governing element of amount.

CHAP. XVII

church, the Teind Court adopt the principle of presuming that the parishioners attend the church provided for them by law, and partake of the sacraments there dispensed.

Ratio of allowance to population.

10. Although no absolutely precise standard in the matter can be appealed to, the general ratio between the population of the parish and the extent of the communion element allowance may be stated as follows:—When the population of the parish is under or about 2000, £8, 6s. 8d. is usually awarded; when the population ranges from 2000 to 3000, £10; and when from 3000 to 5000, £12 is usually given (*a*). If the population exceed 5000, a sum of £15 seems to be the recognised amount unless the population approximate to 10,000, when £20 would probably be granted (*b*). Thus, in the case of Neilston, where the population was 11,013, and the existing allowance for communion elements £15, the Court—the heritors consenting—increased the amount asked to £20 (*c*). In the case of large town parishes, being double charges with exceptionally large populations, so much as £30 has been allocated to each of the collegiate ministers (*d*).

Consent of heritors or otherwise.

11. In exceptional cases the amount of the communion element allowance has not been in accordance with the general standard of proportion now indicated; and although not to the same extent as in the modification of the minister's stipend, the consent of or opposition by the heritors to the amount claimed by the minister for communion elements seems to have affected that awarded by the Teind Court. Thus in one instance where the population of the parish was 3597, and the existing amount of communion element allowance £10, the Court, in the absence of consent on the part of one of the principal heritors, declined to grant any addition (*e*).

(*a*) See Minister of Logie, 1867, 6 M.P. 82.

(*b*) Minister of Shettleston, 1868, not rep.

(*c*) Minister of Neilston, 1865, not reported.

(*d*) The parishes alluded to are those of St. Cuthbert's. Edinburgh, and the Barony, Glasgow.

(*e*) In the case of Minister of Dunse, 1865, not reported.

SECTION IV.—*Specific Object for which Communion Element Allowance awarded.* CHAP. XVII.

12. The communion element allowance is embraced in the decree of modification. It is now invariably awarded in sterling money, payable annually by the heritors to the minister, separately from and in addition to the amount of stipend contained in the decree; and the principle upon which the amount of the allowance is fixed is that the same is at once necessary and sufficient for providing the elements of bread and wine required on the annual occasion or occasions of dispensing the Sacrament of the Lord's Supper in the parish. In accordance with the rules of the Church, the Holy Communion ought to be administered within each parish at least once every year (*a*). As matter of practice, it is dispensed twice a year in a great number of parishes, and in some still more frequently. The amount of the allowance in question has hitherto been, and probably still is, allocated on the footing that the sacrament is not administered oftener than twice a year, even when the fact is otherwise; and the doctrine has been distinctly stated that "were a minister to "dispense the sacrament as often as once every month no "additional claim would accrue to him for communion "element money" (*b*).

To provide elements for communion twice a year.

13. While, in terms of the decree of modification, this money is due to the minister, and payment thereof may be enforced by him against the heritors, it is truly a provision granted to him in trust, for the special and sacred object above referred to. It is the duty of the minister to celebrate the communion regularly in his parish in accordance with existing usage and the laws of the Church; and it is equally his duty faithfully to apply the allowance in question paid to him by his heritors in furnishing the requisite sacramental elements. He is not entitled to divert this provision from

Allowance payable to minister in trust.

(*a*) See Acts of the General Assembly, 1826, Sess. 4.

(*b*) *Per curiam* in Hay v. William-son, 1780, M. 2492.

CHAP. XVII.

its legitimate and sacred purpose, or to convert it into a source of personal emolument (*a*).

Unappropri-
ated balance,
how dealt with.

14. When from failure in the regular administration of the sacrament there arises a balance of unappropriated communion element money in the minister's hands, the heritors cannot demand repetition thereof from him (*b*). Such balance ought to be devoted to a pious use within the parish, as for the support of the poor (*c*). The heritors may, within the years of prescription, sue the minister to compel him so to apply the balance (*d*). It was held in an old case (*e*) that the minister could charge the heritors for payment of the communion element money even although he had not dispensed the communion—he offering to appropriate the money when paid for behoof of the poor. In the absence, however, of an offer or undertaking to this effect, it may be doubted whether such an action would lie, especially after the *dictum* in a much later case (*f*). To constitute failure by the minister to dispense the sacrament it would appear that the omission to do so must be attributable to his own fault and wilful neglect—not to causes or circumstances for which he is irresponsible; and the cases above referred to seem to indicate that innocent failure on the minister's part to celebrate the communion will not free the heritors from liability to him in payment of the allowance contained in the decree.

Failure to ad-
minister sacra-
ment, *quid*?

Proper appli-
cation of allow-
ance presumed.

15. While, as already stated, this allowance ought scrupulously to be applied to the purpose for which it is granted, a Court of law will naturally be inclined to assume and act on

(*a*) Heritors of Abdie *v.* Corsan, 1713, M. 2490.

(*b*) Hay *v.* Williamson, *supra*, M. 2492.

(*c*) Heritors of Abdie *v.* Corsan, *supra*; Heritors of Strathmiglo *v.* Gillespie, 1742, M. 2491.

(*d*) Heritors of Strathmiglo *v.* Gillespie, *supra*.

(*e*) Birnie *v.* Earl of Nithsdale, 1678, M. 2489.

(*f*) Hay *v.* Williamson, *supra*,

where, in reference to the special point there decided, the Reporter observes, M. 2493, "The Court, however, seemed to view this matter in a different light from that of a refusal to pay communion element money to a minister, who had failed to employ it for that sacred purpose; in which case it appeared that the minister would not have been found entitled to demand it." See also Mack Obs. 186, top.

the assumption that the minister has so applied it. On the principle *de minimis non curat prætor*, law would not be inclined to take cognisance of a small balance remaining over after the allowance as a whole had been applied to its distinctive use. The Civil Court would probably be rather averse than otherwise to give effect to a plea rested on alleged culpable failure by the minister to dispense the communion, or to apply the communion allowance, whether urged by the heritors in an action of repetition of the allowance, or by way of defence against a demand for payment of it. Pleas of this nature imply a serious offence, cognisance of which peculiarly belongs to the Ecclesiastical Courts.

CHAP. XVII.

By what courts cognisable.

SECTION V.—*Source whence Communion Element Allowance awarded.*

16. The communion element allowance is awarded out of the teinds (*a*). The claim for communion allowance is ordinarily, if not invariably (*b*), made in the form of a conclusion to this effect embodied in the summons at the minister's instance for a modification or augmentation of stipend. The allowance, when awarded, is made payable at the terms of Whitsunday and Martinmas yearly. It has been argued, without express contradiction, but not, it is believed, decided, that a charge for the allowance in question, just as for minister's stipend, can be suspended only on a discharge produced, or on consignation (*c*).

17. When the teinds of the parish are exhausted, *i.e.* when there are no surplus teinds, the Court cannot award, in name of communion element allowance, a sum against the heritors; for in this matter, just as in the allocation of

Claim, how made.

Hence only when there is surplus teind.

(*a*) Heritors of Logie *v.* Erskine, 1772, M. 15,691; Wilkie *v.* Heritors of Cults, 1793, M. 2493; Minister of Lochlee, 1810, Connell, Tithes, vol. i. p. 454; Buchanan *v.* Magistrates of Dunbar, 1866, 4 M.P. 1023.

(*b*) *Per curiam* in Buchanan, *v.* Magistrates of Dunbar, *cit.*

(*c*) Hay *v.* Williamson, 1780, M. 2492, and there argument for defender.

CHAP. XVII.

stipend, they cannot modify out of the stock (a). While, however, these provisions so far agree, they differ in various respects, and among others in these, viz. that the communion allowance is modified, not in victual convertible at the fairs prices as stipend is, but in money; that the amount of the allowance awarded is not included within the ann; and that it does not fall under the rule applicable to vacant stipend.

Jurisdiction of
Teind Court.

18. The Teind Court will not entertain in a process of augmentation a claim for communion elements in implement of an alleged contract or agreement to provide such. When an obligation to this effect is founded on it must be established and enforced by an action in the ordinary courts (b).

Obligation to
supply allow-
ance, how
construed.

19. An obligation, voluntarily undertaken by a party in favour of the minister of the parish and his successors, to supply the elements of bread and wine to be used at the communion, is construed to mean so much of these elements as are required for the due celebration of the ordinance—regard being had to the amount thereof required for the time, according to the circumstances of the parish. Such obligation does not subject the granter of it to furnish a quantity in manifest excess of the requirement, even although the quantity demanded may have actually been annually supplied for upwards of forty years. To this effect is the second case of Dunbar (c).

SECTION VI.—*Communion Element Vessels and Furniture.*

Communion
vessels and
furniture, &c.
supplied "by
"parochiners"
under 1617,
c. 6.

20. Provision was made for supplying the requisite sacramental vessels and furniture by the Act 1617, c. 6, which ordained that all parish churches should be provided (1) with basins and lavoires for the administration of the sacrament of baptism, and (2) with cups, tables, and table-cloths for the administration of the Communion. These several articles

(a) *Per curiam* in *Wilkie v. Heritors of Cults*, *supra*; and in *Buchanan v. Magistrates of Dunbar*, *supra*, at p. 1025.

(b) *Buchanan v. Magistrates of Dunbar*, 1866, 4 M.P. 1023.

(c) *Buchanan v. Magistrates of Dunbar*, 1869, 7 M.P. 576.

were to be furnished at the expense of the "parochiners," on the requirement of the minister of the parish, who, under the penalty of forfeiting one year's stipend, was to cause them to stent themselves therefor between the date of the Act (June 1617) and the month of February following. With the view of compelling the "parochiners" to meet and stent themselves, and pay their respective shares, the Court of Session was authorised to issue letters of charge against them to this effect.

CHAP. XVII.

21. When purchased, the baptismal and communion vessels and furniture were to be committed to the keeping of the minister of the parish, who, and his heirs and executors, were to be answerable to the parish in case they were lost or applied to any profane use. The term "parochiners," used in this Act, has been construed in practice to mean "heritors," just as in the Statutes 1572, c. 54, and 1597, c. 232, applicable to the reparation of churches and churchyards respectively, where the same term is employed (*a*).

Committed to minister's charge.

"Parochiners" means heritors.

(*a*) See Dunlop, Parochial Law, 3d. ed. p. 447, s. 3.

CHAPTER XVIII.

CHAP. XVIII.

SUPPLEMENTARY.

IN this brief chapter a few matters and cases will be noticed which escaped observation in their appropriate place, or for which there was no very appropriate place in any of the preceding chapters.

SECTION I.—*Glebes (Supplementary).*

Prescription,
Title.

1. Although a proprietor may prescribe a right to glebe land against the Church by possession for forty years upon a feudal title, no such right can be prescribed except upon a habile feudal title, and accordingly possession for upwards of a century under a decree of Presbytery was found to be insufficient to prescribe a right to the glebe (*a*).

Feuing pre-emption.

2. Where authority has been obtained to feu land but the power has not yet been exercised, a heritor may, in the absence of objection, be allowed to exercise the right of pre-emption although the statutory period for the exercise of this right has expired (*b*). It is competent for the heritors to attach a condition to their consent to the feuing of the glebe, and such condition must be given effect to in the model feu-charter sanctioned by the Court (*c*).

Conditional consent.

Investment of money price of glebe compulsorily taken.

3. When a glebe, or a portion of it, has been acquired under compulsory powers and the price has been invested otherwise than in the purchase of land, the company which acquired the land are liable for the expenses attending any

(*a*) *Bain v. Grant*, 1884, 22 S.L.R. 132.

(*b*) *Stewart*, Petitioner, 1887, 25 S.L.R. 828.

(*c*) *Boyd*, Petitioner, 1882, 19 S.L.R. 828.

necessary reinvestment of the purchase price, as by the calling up of a bond (a). CHAP. XVIII.

4. A minister is not entitled to be enrolled as a Commissioner of Supply in respect of his temporary ownership of the glebe (b). Commissioner of Supply.

SECTION II.—*Manse Water Supply (Supplementary).*

5. It was held by the Lord Ordinary (Kinloch), in the case of Earl of Cawdor *v.* Ross (c), that where there is no question of extensive repair of the manse, a parish minister who has hitherto had a well supply cannot demand the introduction of water into the manse. The case was ultimately settled. In the recent case of Prestonpans it was found that where the manse had been included within a water district the minister had no claim upon the heritors to pay the water assessment (d). Introduction of water supply.
Water rates.

SECTION III.—*Status of Parish Quoad Sacra.*

6. The cases with reference to the position and status of a parish *quoad sacra* are collected in the note by the Lord Ordinary (Wellwood) to *Baillie v. The Parochial Board of Sorn* (e). He there quotes the *dictum* of Lord Medwyn in *Grant v. Macintyre* (f):— Judicial dicta.

“That this parish is one only *quoad sacra* and is not declared to be *quoad civilia* also does not affect the minister in his ecclesiastical character, nor in any of his proper ecclesiastical rights, or duties, or privileges. The exception of its not being a parish *quoad civilia* of course applies only to civil rights, and those not even affecting the minister, but the inhabitants of the original parish out of which the new parish has been taken. Thus the new parish has no parochial school, and the heritors within it remain liable for the support of the parochial school attached to the parish. The absence of a school neither affects the status of the minister nor influences the character of the parish

(a) *Gunn v. Dollar Parochial Board*, 1886, 23 S.L.R. 623.

(b) *Leslie v. Orkney Commissioners of Supply*, 1883, 20 S.L.R. 362.

(c) 1867, 39 Jurist, 553.

(d) *Smith v. Heritors of Prestonpans*, 27th Jan. 1903.

(e) 1889, 27 S.L.R. 6.

(f) 1849, 11 D. 1387.

CHAP. XVIII.

Parishes existed throughout Christendom and in this country long before the Act of 1663 and those of 1693 and 1696 were passed. The same observation applies to the heritors of the old parish who are now within the new, continuing liable for the repairs of the manse and church as before, those matters being otherwise provided for as to the new parish. So also as to the provision for the poor. Both of these are burdens laid on with us subsequent to the Reformation, and any duties of the clergy attached to them are extrinsic to and superadded to the proper functions of the benefice."

He also quotes the Lord Justice-Clerk (Inglis) in *Cheyne v. Cook (a)* :—

"This, then, is a parish *quoad sacra*, and the minister is the minister of a parish *quoad sacra*, and as such he is just in the same position as the minister of a parish *quoad omnia*, except that he has no right to the teinds. In some respects, for example, as regards the administration of the poor law, a parish *quoad sacra* differs from a parish *quoad omnia*, but, so far as the minister and the benefice are concerned, these differences are altogether unimportant ; the single difference is that he has no claim on the teinds, and no claim on the heritors for manse and glebe. There is then no doubt that the minister is the minister of a parish, and that he is possessed of a benefice : Therefore as regards the character of the parish as forming a benefice, and the status and rights of the minister (except in regard to the matters above mentioned), a parish erected *quoad sacra* is placed by the statute in the same position as one erected *quoad omnia*."

Kilmarnock
case.

7. In the case of a charity, the trustees of which were "the ministers of the Church of Scotland in Kilmarnock," it was held that the ministers of parishes *quoad sacra* erected in the town of Kilmarnock subsequent to the date of the bequest were trustees of the charity (b).

Constitutions
of churches.

8. The only cases with reference to the constitutions of the churches of parishes *quoad sacra* are very special (c). The question as to the power of the General Assembly, with the approval of the Court of Teinds, to alter such constitutions is, as these sheets go to press, under the consideration of the Court of Teinds in the Oban Church case. The church of

Transporta-
tion.

(a) 1862, 1 M'P. 969.

(b) Buchanan's Trustees, 1886, 14 R. 284. Sequel, Buchanan's Trustees v. Dunnett, 1895, 22 R. 602.

(c) See Managers of Forth Church v. Darling, 1898, 25 R. 747 and 1 F. 177.

a parish *quoad sacra* may be transported by the Court of Teinds. This has been done more than once (a). CHAP. XVIII.

SECTION IV.—*Patronage Compensation.*

9. Two cases have occurred under the compensation provisions of the Patronage Abolition Act of 1874. It was found that the compensation falls to be paid to the heirs *in mobilibus* of the proprietor who was in possession when the Act was passed, and who claimed the compensation (b). Where a patron entitled to compensation made no demand on the occurrence of a vacancy against the stipend-paying heritors, and these in *bona fide* paid the whole stipend to the minister, it was held that the patron had no claim against these heritors (c). To whom payable.
Where not claimed timeously?

SECTION V.—*Miscellaneous Fines and Dues payable to Kirk-Session (d).*

10. In addition to the mortcloth dues referred to at p. 215, there were certain other dues and fines payable to the kirk-session for behoof of the poor. These funds were in supplement of the kirk-session's half of the ordinary church-door collections for the relief of casual poverty. Whilst as a general rule the dues paid for the proclamation of banns and on the occasion of baptisms belong to the session clerk as emoluments of his office, it appears that in some parishes the practice prevailed of applying a proportion of these dues for behoof of the poor (e), and probably this practice was law when it was sanctioned by immemorial use. Payments appear, too, in Parochial dues.

(a) In dealing with the question of church rebuilding in CHAPTER V, it ought to have been pointed out that when it is proposed to choose not merely a new site, but a site at a different part of the parish, the authority of the Court of Teinds under the Act 1707, c. 9, 'is required for the "transportation" of the church.

(b) *Paterson v. Paterson*, 1888, 15 R. 1060,

(c) *Earl of Strathmore v. Rescobie Heritors*, 1888, 15 R. 364.

(d) See *supra*, pp. 604, 611, 616.

(e) See *Beveridge v. Bayne*, 1765, M. 8014. *Cunninghame v. M'Ewan*, 1854, 16 D. 511; per Lord President Colonsay, 516.

CHAP. XVIII.

Fines and
penalties.

some cases to have been in use to be made for the use of the bell on festive or funereal occasions.

11. Another course of emolument of a more casual character was the statutory forfeiture in favour of the kirk-session under the Act 1621, c. 14, of money beyond 100 marks won at cards or dice or by bets on horse races. A number of cases of the enforcement of this forfeiture are referred to by Mr. Duncan (*a*). It seems doubtful whether this statute is to be regarded as in desuetude (*b*). It is certainly not *in viridi observantia*. It appears at one time to have been the practice to compound for the public penance and the pecuniary penalties under 1661, c. 38, for fornication by a substantial payment for behoof of the poor (*c*). Under the Day Trespass Act (2 and 3 Will. IV. c. 68, section 7) fines for day poaching are payable to the kirk-session for behoof of the poor.

SECTION VI.—*Banns of Marriage.*

12. The subject of banns belongs on its civil side to the law of marriage, and on its ecclesiastical side to Church law. Reference may be made under the former to the works of Lord Fraser and Mr. Walton, and to the article in Green's Encyclopædia. The latter is dealt with in Mair's Digest of Church Laws. Reference may also here be given to the Marriage Notice (Scotland) Act, 1878 (41 and 42 Vict. c. 43), and to the regulations embodied in the Act of Assembly VIII. of 1880 (Cook's Church Styles, p. 41). The manner of proclamation is one entirely for ecclesiastical arrangement. In parishes *quoad sacra* the banns are proclaimed in the church of the parish *quoad sacra* (*d*). The question of the dues exigible for proclamation of banns has already been dealt with (*e*).

(*a*) Duncan, Parochial Law, p. 670.

(*b*) The last reported cases appear to be those of Maxwell *v.* Blair, 1774, M. 9522, 2 Hailes, 605, and Kirk-Session of Dumfries *v.* Kirk-Session of Kirkeudbright and Kelton, 1775, M. 10,580, 2 Hailes, 634.

(*c*) Grant *v.* Davidson, M. 9571, 2 Hailes, 1001.

(*d*) Hutton *v.* Harper, 2 R. 893; affd. 3 R. (H.L.) 9.

(*e*) *Supra*, p. 617.

APPENDIX.¹

No. I.

THE NEW PARISHES (SCOTLAND) ACT, 1844.

7 and 8 Vict. c. 44, An ACT to facilitate the disjoining or dividing of extensive or populous Parishes, and the erecting of new Parishes, in that part of the United Kingdom called Scotland. (19th July 1844.)

APPENDIX,
NO. I.

[*Preamble recites Scots Act, 1707, c. 9.*]

I. . . . [Repealed 37 and 38 Vict. c. 96 (*S.L.R.*)] The consent of the heritors of a major part of the valuation of any parish shall be necessary and sufficient in all cases in which the consent of the heritors of three parts of four of the valuation of such parish was required by the said recited Act, except where otherwise hereinafter expressly provided.

Consent of major part of heritors in value to be sufficient.

II. A parish may be deemed and held to be too large, and may, as such, be disjoined or divided under the provisions of the said recited Act as altered and amended by this Act by reason of the largeness of the population of such parish, although the superficial measurement thereof may not be too large for one parish.

Largeness of population to be a reason for division of parish.

III. It shall not be a valid objection to the competency of any process which shall be brought for disjoining or dividing a parish or parishes and erecting a new kirk or kirks, under the provisions of the said recited Act as altered and amended by this Act, that the consent of the heritors of a major part of the valuation of the parish to be disjoined or divided had not been given previous to such process having been brought into Court; and it shall be lawful for the Lords of Council and Session, before whom any such process shall have been brought, to appoint special intimation thereof to be made, in such form and manner as the said Lords of Council and Session shall direct, to such of the heritors of the valuation of the parish as shall not have already either given their consent or judicially stated their dissent, and to sist proceedings in

Non-consent of heritors previous to application to Court not to be deemed valid objection to process for disjoining parishes. Proceedings may be stayed to enable them to state their consent or dissent.

¹ The Statutes in the Appendix are in chronological order. See list in Contents.

APPENDIX,
NO. I.

such process for a definite time for the purpose of allowing such heritors to state judicially their consent or their dissent; and such of them as shall not, within a time to be fixed by the said Lords of Council and Session, and to be specified in such intimation as aforesaid, judicially state their dissent, shall, in computing the statutory proportion of consents, be reckoned as consenting heritors.

Where proof is given that a sufficient church accommodation exists in the new parish proposed to be erected, Lords of Council may allow process to proceed although heritors may not have consented.

IV. If, in any process for disjoining or dividing a parish, it shall be shown to the satisfaction of the Lords of Council and Session that there is already built or erected and in good repair a church or place of worship suitable for the church of the new parish proposed to be erected, and capable of being lawfully appropriated to that purpose, whereby the expense of erecting a new or additional church will not be incurred by the heritors, and that the titulars or others having right to the teinds out of which is to be paid not less than three-fourths of the additional stipend or stipends to be modified by reason of such disjunction or division have consented thereto, or have stated no objection thereto, after due intimation by direction of the Lords of Council and Session to them given, it shall be lawful and competent for the said Lords of Council and Session to allow such process to proceed, and to give judgment and decree therein, if, upon consideration of the whole case, it shall appear to them that there are good and sufficient reasons for so doing, although the heritors of a major part of the valuation of the parish to be disjoined or divided may not have consented.

V. [*This section deals with patronage, and is obsolete.*]

In certain cases a parish, though divided, may remain as one parish for purposes of support, &c. of the poor.

VI. And whereas in some large and populous parishes which it may be considered necessary or proper to divide into two or more parishes there are a number of poor persons, the greater portion of whom reside in or near the same locality, such locality being sometimes the least wealthy, whereby the particular territorial division of such large and populous parish, which would be most expedient and advantageous in other respects, would operate injuriously or unjustly if each of the new parishes into which it may be divided was left to provide from its own resources for that portion of the poor of the original parish resident within the territory of such new parish; be it enacted, That it shall be lawful for the said Lords of Council and Session, if they see cause so to do, in any judgment to be by them pronounced dividing or disjoining a parish, to declare and provide, that, notwithstanding such division or disjunction, the original parish and the several new or separate parishes thereby erected within the bounds thereof shall, in so far as regards the

support and management of the poor, and all matters and questions connected therewith, remain and be regarded as one parish; and in every such case there shall be one kirk-session, consisting of the members of the kirk-sessions of all the parishes within the bounds of the original parish, in all matters and questions relating to the support and management of the poor; and the session clerk of the original parish shall, during his incumbency act as clerk of the said kirk-session in all such matters and questions.

VII. [*Repealed 55 and 56 Vict. c. 19 (S.L.R.).*]

VIII. If any person or persons shall, at his, her, or their expense, have built, or shall have acquired or shall have undertaken to build or acquire, a church, and shall have endowed or shall have undertaken to endow the same, it shall be competent for the Lords of Council and Session, acting in their capacity aforesaid of Commissioners for the plantation of kirks and valuation of teinds, and they are hereby empowered and authorised, on the application of such person, or of such persons where they do not exceed five in number, or of two-thirds or any ten of such persons where they do exceed five in number, and without any concurrence of heritors, to inquire into the circumstances, and to erect such church into a parish church in connection with the Church of Scotland, and to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same, or any part thereof, may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland; and it shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland: Provided always, that nothing herein contained shall be construed so as to deprive any party who has a legal interest in the fabric of any place of worship of any right which by law belongs to such party to prevent such place of worship from being used or appropriated for a place of worship in connection with the Church of Scotland: Provided also, that due intimation of every such application as aforesaid shall be made to all parties having interest, that they may have an opportunity of appearing and being heard; which intimation may be made by notice in the *Edinburgh Gazette*, or by advertisement in one or more Edinburgh newspapers of general circulation, or in any other form or manner that may be directed by the Lords of Council and Session in any Act or Acts of Sederunt, or any order to be made by them for that purpose:

Where a church is built and endowed, a district *quoad sacra* may be attached thereto. Church to be secured as parish church in connection with Established Church of Scotland, and provision made for maintenance of fabric and endowment of minister and manse. Right of Presbyteries to present *jure devoluto* to prevail.

APPENDIX,
NO. I.

And provided also, that the titles to the said church shall be taken and conceived so as that the said church shall be inalienably secured as the church of the said new parish in connection with the Church of Scotland, and that due provision shall be made for the future maintenance of the fabric of the said church ; and that the endowment for the minister of the said new parish shall be not less than a stipend of one hundred pounds per annum, or seven chalders of oatmeal, to be calculated at the highest fiars of the county, exclusive of the sum necessary for communion elements, with a suitable dwelling-house or manse and offices and appurtenances, or a stipend of not less than one hundred and twenty pounds, or eight and a quarter chalders of oatmeal, to be calculated at the highest fiars of the county, per annum, where there shall be no such dwelling-house or manse ; and that such stipend of not less than one hundred pounds or not less than one hundred and twenty pounds shall be permanently provided and secured in all time coming for the minister of the said parish ; and that if there shall be a dwelling-house or manse, the title to such dwelling-house or manse and offices and appurtenances shall be taken and conceived so that such dwelling-house or manse and offices and appurtenances shall be inalienably secured as the dwelling-house or manse and offices and appurtenances for the minister of the said parish ; and that due provision shall be made for the future maintenance of the fabric of such dwelling-house or manse and offices and appurtenances, all to the satisfaction of the said Lords of Council and Session ; and the right of Presbyteries to present to vacant parishes *jure devoluto*, according to the law of Scotland, shall have place in regard to all parishes erected *quoad sacra* as aforesaid, in the same manner as in regard to other parishes.

Distribution of
pews. Appli-
cation of pew
rents. Col-
lections.

IX. In every such church as aforesaid a portion of the sittings therein, to be determined by the Sheriff of the county in which such church is situated, and not exceeding one-tenth of the whole sittings, shall be set apart as free seats for all persons frequenting the same ; and another portion of the sittings therein, not exceeding one-fifth of the whole sittings, shall be let at rents not exceeding a rate to be fixed by the presbytery of the bounds ; and the remaining portion of the sittings may be let in such manner as shall be agreed upon by the minister for the time being, and the person or persons liable for the repair of the church and for the stipend of the minister, or in case of not agreeing, then in such manner as shall be determined by the Sheriff of the county as aforesaid : Provided always, that one pew shall be appropriated, rent

free, for the accommodation of the family of the minister, and another pew for the officiating elders; and the pew or seat rents of any such church as aforesaid may be expended and applied for the purpose of defraying the necessary expenses of a precentor, a beadle or kirk-officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and not otherwise provided for, and for the purpose of upholding in due repair and improving the fabric of such church, or of the dwelling-house and offices of the minister, or for the relief of any person or persons who may have undertaken or become liable to uphold the same, or who may be liable for the endowment or stipend provided and secured for the minister of such church; and it shall be lawful to make collections at the door of any such church for any of the purposes aforesaid: Provided also, that the sum received by any person liable to uphold the church or dwelling-house, or liable for the endowment or stipend as aforesaid, shall not in any year exceed the sum paid or expended by such person in the same year by reason of such liability.

X. It shall and may be lawful for any heritor or for any heir of entail in Scotland, trustee, tutor, and curator of minors, and every person lawfully empowered to act for persons under any legal disability or incapacity, to give and grant, heritably and irredeemably, such land or heritage belonging to them, or under their management, as may be necessary for the site of such church, dwelling-house, and offices as aforesaid, and also a portion or portions of land near the same for a churchyard or for a glebe, and not exceeding in the whole four acres; which portion or portions of land shall, at the sight of the Sheriff of the county wherein the same is situated, or of some person appointed by the Sheriff for that purpose, be marked out and set apart as the churchyard and as the glebe, to belong to such new parish in all time coming, and, having been so given, granted, marked out, and set apart, shall not be liable to, or affected by any other rights, titles, trusts, interests, or encumbrances to, in, or upon the same whatsoever; and such heir of entail shall not thereby be subject to nor incur any forfeiture or irritancy under any deed of entail, by virtue of which he or she may hold the said land or heritage; and such trustee, tutor, or curator, or other person as aforesaid, shall be indemnified for what he may do in the premises: Provided always, that the power hereby given to any heir of entail, trustee, tutor, and curator of minors, and every person lawfully empowered to act for persons under legal disability or incapacity, shall not, in

Sites for churches, &c. may be granted by persons under disability. Consent of next heir not under disability required. Consideration for grant.

APPENDIX,
NO. I.

any case, extend to or be understood to comprehend a power giving and granting any lands or heritages within half a mile of the manor place, in the natural possession of the proprietor, or of giving and granting any, or any part of any gardens, orchards, or inclosures, adjacent to the manor place, which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years, when the heir in possession was of lawful age, and not under any legal disability or incapacity : Provided also, that no such grant as aforesaid, by any heir of entail in possession, or by any trustee, tutor, curator, or other person lawfully empowered to act as aforesaid for any such heir of entail, shall be effectual, unless the heir of entail nearest in succession, of lawful age, and not under any legal disability or incapacity, shall have consented to such grant, which consent may be given by letter, or other writing, under the hand of such heir of entail nearest in succession, and shall be proved to the satisfaction of the said Sheriff of the county : Provided also, that no trustee, tutor, or curator of minors, or person lawfully empowered to act for persons under legal disability or incapacity, shall make any such grant as aforesaid, without adequate consideration for the same, either in price or feu-duty, the adequacy of which consideration shall be proved to the satisfaction of the said Sheriff of the county, before the portion or portions of land shall be marked out or set apart as aforesaid.

Lands of persons under disability may be burdened for endowments and repairs. Consent of next heir not under disability required.

XI. It shall and may be lawful for any heir of entail in Scotland to burden the lands and estate of which he or she is in possession as heir of entail aforesaid, lying within any district to be marked out and designated as aforesaid, or to give security over the same for the annual payment, out of the clear yearly rents and profits of the said lands and estate, of any sum not exceeding three pounds per centum of such clear yearly rents and profits, after deducting all prior burdens and provisions, as the same shall be ascertained by an average of the five years immediately preceding such burden or security, and in no case exceeding the yearly sum of one hundred and twenty pounds, for the purpose of endowing or contributing to the endowment of such new parish as aforesaid ; and also to burden such lands and estate, or give security over the same, for upholding in due repair the fabric of the church of such new parish, and the dwelling-house and offices of the minister, or any of them ; the sums to be expended in such repairs not exceeding, in any one year, one pound per centum on the amount of money originally expended in building or purchasing and complet-

ing such church, or upon the estimated value thereof, when received and recognised as the church of such new parish, and one pound per centum on the amount of money originally expended in building or purchasing and completing such dwelling-house and offices, or upon the estimated value thereof; and such heir of entail shall not, by reason of such acting as aforesaid, be subject to nor incur any forfeiture or irritancy under any deed of entail, by virtue of which he or she may hold such lands or estate; and such burdens and securities shall be as valid and effectual against such lands and estates as if the same had not been entailed: Provided always, that no such burden or security as aforesaid shall be effectual, unless the heir of entail nearest in succession, of lawful age, and not under legal disability or incapacity, shall have consented thereto, which consent may be given judicially, or by letter or other writing under the hand of such heir of entail nearest in succession: Provided also, that if such heir of entail nearest in succession as aforesaid shall be an heir of the body of the heir of entail in possession, who intends to create such burden or security, then such heir of entail in possession shall, three months at least before creating the same, give notice of such his intention in writing, to the heir of entail next entitled to succeed to the said estate after the heirs of his own body, if within Great Britain or Ireland, and if the heir next entitled to succeed is not within Great Britain or Ireland, to his nearest male relation by the father, of lawful age, or to his known factor or attorney; and before any such burden or security, as aforesaid, shall be created, evidence shall be produced, to the satisfaction of the said Lords of Council and Session, that such consent as aforesaid, and such notice as aforesaid, where required, have been given, and that the means of public worship for the inhabitants of such district are wanting, and cannot be adequately provided, unless the power hereby given of burdening the entailed estate shall be exercised to the extent proposed.

XII. And whereas in some populous parishes and districts in the low country of Scotland, particularly in large towns, and in the neighbourhood of cities and royal burghs, there are a great number of persons, natives of the Highlands and Islands of Scotland, who do not understand the English language, so as to be capable of receiving the full benefit of religious instruction in English, or of having the ordinances of religion administered to them with advantage in that tongue: And whereas it is expedient that some provision should be made for enabling such persons to obtain religious instruction, and to have the ordinances of religion administered to

Provision for
religious service in the
Gaelic
language.

APPENDIX,
NO. I.

them, in the Gaelic language; be it enacted, That in disjoining or dividing any large or populous parish or parishes in which there are a great number of such persons, it shall and may be lawful to make provision for the spiritual wants of such persons by appointing religious instruction to be communicated to them, and the ordinances of religion to be dispensed among them, in the Gaelic language.

A separate parish may be formed for that purpose.

XIII. Where a separate church shall have been erected for any such Gaelic congregation, and a permanent endowment shall have been secured for the same, either from teinds or otherwise, to the satisfaction of the said Lords of Council and Session, it shall and may be lawful to erect such church and the congregation thereof into a separate parish, although the members of such congregation may be scattered, and no territorial district may be assigned to such parish exclusively; and it shall and may be lawful for the minister or ministers and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister or parish ministers and elders of the Church of Scotland: Provided always, that nothing herein contained shall be construed as giving to the minister or ministers and elders of any such Gaelic congregation right to exercise pastoral superintendence and discipline over persons who are not either members of such Gaelic congregation, or of the families of such members, or resident within the territorial district, if any, which may be assigned to such parish exclusively.

4 Geo. IV. c. 79. 5 Geo. IV. c. 90. Where churches have been built and districts assigned under recited Acts, such districts may be formed into parishes *quoad sacra*.

XIV. And whereas an Act was passed in the fourth year of the reign of His late Majesty King George the Fourth, intituled, "An Act for building additional places of worship in the Highlands and Islands of Scotland;" and another Act was passed in the fifth year of the reign of His said late Majesty King George the Fourth, intituled, "An Act to amend an Act for building additional places of worship in the Highlands and Islands of Scotland:" And whereas, under the authority and provisions of the said two last-mentioned Acts, several additional places of worship have been built or provided, and certain districts have been defined or set apart for the benefit of which the said places of worship were built or provided, and ministers have been appointed to officiate at such places of worship and in such districts, and dwelling-houses and appurtenances have been built or provided for the ministers so officiating; and provision has been made for the payment to such ministers of stipends not exceeding the sum of one hundred and twenty pounds per annum in any one case; and provision is made

by the said last-mentioned Act for upholding in repair such places of worship and dwelling-houses and appurtenances; be it enacted, That upon application by the Presbytery within which any such place of worship is situated, or by one or more heritors holding together one-fourth part of the valuation of the district defined and set apart as the district for the benefit of which such place of worship has been provided, or of her Majesty's Advocate for Scotland, it shall and may be lawful for the said Lords of Council and Session, acting as aforesaid, to disjoin such district from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect the same into a parish *quoad sacra*; and in every such case the place of worship built or provided as aforesaid may be held and appointed to be the church of such parish, and the dwelling-house and appurtenances provided for the minister may be held and appointed to be the dwelling-house of the minister of such parish; and the provisions contained in the said two last-mentioned Acts may be held and taken to be sufficient provisions for upholding in repair such church and dwelling-house and appurtenances, and a stipend of one hundred and twenty pounds, payable under the provisions of the said Acts, may be held to be sufficient stipend for the minister of the said parish; and it shall and may be lawful for the minister and elders of such parish to have and enjoy the status, and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland.

XV. If in any case in which a place of worship has been built, and a district has been defined and set apart, under the provisions of the said two last-recited Acts, application shall be made to the said Court to erect such district alone, or such district with additions thereto, into a new parish *quoad omnia*, with the requisite consent of heritors, and that the said Court shall give effect to such application, it shall and may be competent for the said Court to declare and appoint the place of worship already erected in such district to be the church of such new parish, and to appoint and declare the dwelling-house already erected for the minister to be the manse of such new parish; and the Commissioners under the said last-recited Acts shall thereupon cease to hold such place of worship and such dwelling-house for the purposes of the said last-recited Acts; and the provisions contained in the said last-recited Acts for upholding such place of worship and such dwelling-house in repair shall cease and determine, and the burden of upholding the same shall fall on the parties who by the law of Scotland would

If any place in which a church has been erected under recited Acts is made a parish *quoad omnia*, such church may be appointed as the parish church. Charge of future repairs thereof. Stipend of minister.

APPENDIX,
NO. I.
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be bound to uphold the church and manse of the parish, if such church and manse had been appointed to be built for the newly-erected parish; and in fixing the stipend to be paid to the minister of such newly erected parish, the said Court shall compute as stipends the sum paid by authority of the said last-recited Acts to the minister in such district, which sum shall be continued to be paid to the minister of such newly erected parish. . . . [*Remainder repealed 55 and 56 Vict. c. 19 (S.L.R.).*]

Provisions of
50 Geo. III. c.
84, and 5 Geo.
IV. c. 72, not
to extend to
parishes
erected under
the present
Act.

XVI. The provisions of the Teinds Act, 1810, and the provisions of the Teinds Act, 1824, shall not be extended to any new parishes erected under the provisions of this Act, although the stipend or endowment modified or provided for the minister of any such new parish should be less than one hundred and fifty pounds sterling.

XVII. [*Repealed 37 and 38 Vict. c. 96 (S.L.R.).*]

No. II.

THE BURIAL-GROUNDS (SCOTLAND) ACT, 1855.

18 and 19 Vict. c. 68, An ACT to amend the Laws concerning the Burial of the Dead in Scotland. (23d July 1855.)¹

Short title.

I. This Act may be cited as the "Burial-Grounds (Scotland) Act, 1855."

Parochial
Board to carry
into execution
this Act.
17 and 18
Vict. c. 91.

II. In the execution of this Act in parishes not within the limits prescribed or established under the Lands Valuation (Scotland) Act, 1854, of any burgh sending or contributing to send a member to Parliament, "parochial board" shall be held to signify the parochial board for the management of the poor, where such parishes are not combined for such management, and where such parishes are so combined, the parochial board under this Act shall signify and be composed of such members of the combined board as are assessed for relief of the poor either in respect of occupancy or ownership within each parish respectively; and the manner of holding and of transacting business at meetings of such parochial boards under this Act shall be similar to the

¹ The powers and duties of a Secretary of State under this Act are transferred to the Secretary for Scotland (48 and 49 Vict. c. 61, s. 5), and those of Parochial Boards to Parish Councils (57 and 58 Vict. c. 58, s. 21).

manner in use in respect of the management of the poor ; and in parishes within the aforesaid limits of any burgh aforesaid, the Town Council of the burgh shall be held to be the parochial board of such parish under this Act : Provided always, that where, within the aforesaid limits of any burgh aforesaid, there is included a burgh of regality, the magistrates of such burgh of regality shall, notwithstanding anything hereinbefore enacted, be held to be the parochial board of any parish within or forming part of such burgh of regality.

APPENDIX,
NO. II.

III. Where any parish is partly within and partly without the limits of such burgh aforesaid, it shall be lawful for the Sheriff of the county within which such parish or the greater part thereof is situated, on application to him by any two members of the parochial board of such parish, or by any ten persons assessed for relief of the poor within such parish, or by any two or more householders residing within one hundred yards of any burial ground or proposed burial-ground within such parish, and on giving notice by advertisement in the *Edinburgh Gazette*, and such newspapers of local circulation, as he may deem fitting, and hearing any parties having interest, to determine whether such parish shall be held to be a parish within or without the limits of the said burgh for the purposes of this Act, and an interlocutor so determining shall receive effect and be as valid as if the same was set forth in this Act ; and it shall not be competent to make any new application to the Sheriff for his determination in respect to such parish till after the lapse of five years from the date of his last determination respecting the same.

Provision as to
parishes partly
burghal.

IV. It shall be lawful for any two members of the parochial board of any parish in Scotland, or for any ten persons assessed for relief of the poor within such parish, or for any two householders residing within one hundred yards of any burial-ground or proposed burial-ground, to present a petition to the Sheriff of the county within which such burial-ground or proposed burial-ground is situated, setting forth that a burial-ground within such parish or such distance is or would be dangerous to health, or offensive or contrary to decency ; and the Sheriff shall thereupon fix a day, being not less than ten nor more than twenty days after such petition is presented, for inquiring into the allegations contained therein, and shall appoint intimation thereof to be made by advertisement in the *Edinburgh Gazette*, and in such newspapers of local circulation as he shall deem fitting, and on hearing the petition shall permit all parties whom he shall judge to have an interest to

Proceedings on
complaints of
danger to
health.

APPENDIX,
NO. II.

appear and be heard in such manner as he shall deem fitting ; and if on such hearing he shall be of opinion that any of the aforesaid allegations are true, he shall pronounce an interlocutor to such effect, and shall transmit a copy thereof to one of her Majesty's principal Secretaries of State : Provided that it shall not be competent to present any such petition to the Sheriff, except with concurrence of the procurator-fiscal, till after the lapse of five years from the date of any petition to the like effect having been dismissed.

Discontinuance
of burial-
grounds.

V. It shall be lawful for her Majesty, from time to time, by Order in Council, upon the representation of one of her Principal Secretaries of State, that a copy of such interlocutor of a Sheriff has been received by him, in pursuance thereof to order that no new burial-ground shall be opened within certain limits specified in such order, save with the previous approval of one of such Secretaries of State, or (as the case may require) that after a time mentioned in the Order burials within certain limits, or in certain burial-grounds or places of burial, shall be discontinued wholly, or subject to any exceptions or qualifications mentioned in such Order, and such Order in Council shall thereupon have like force and effect as if the same were embodied in this Act : Provided always, that notice of such representation, and of the time it shall please her Majesty to order the same to be taken into consideration by the Privy Council, shall be transmitted to the Crown agent in Edinburgh, and the sheriff-clerk of the county in which such burial ground is situated ; and the same shall be by them respectively published in the *Edinburgh Gazette*, and fixed on the doors of the church of or on some other conspicuous places within the parishes affected by such representation, one month before such representation is so considered.

Penalties.

VI. Every person who shall after the time mentioned in such Order in Council bury any body, or in anywise act or assist in or permit the burial of any body, in any way contrary to such Order, shall be liable for each such offence to be imprisoned for any period not exceeding two calendar months, or to pay a penalty not exceeding twenty pounds.

Saving as to
burial-grounds
of Quakers or
Jews and
private burial-
grounds.

VII. No such Order in Council as aforesaid shall be deemed to extend to any burial ground of the people called Quakers, or grounds of the persons of the Jewish persuasion, used solely for the burial of the bodies of such people and persons respectively, unless the same be expressly mentioned in such Order, or shall be deemed to extend to any non-parochial burial-ground, being the property of

any private person, unless the same be expressly mentioned in such Order.

APPENDIX,
NO. II.

VIII. Provided always, that, notwithstanding any such Order in Council, where at the time of the passing of this Act any person shall be entitled to any right of interment in or under any church or chapel, or within any churchyard or burial-ground affected by such Order, it shall be lawful for one of Her Majesty's Principal Secretaries of State, from time to time, on application being made to him, and on being satisfied that the exercise of such right will not be injurious to health, to grant licence for the exercise of such right during such time and subject to such conditions and restrictions as such Secretary of State may think fit, but such licence shall be revocable at any time, and shall not give to the holder of such right, or to any other party, any other power than he would have had if this Act had not been passed.

Saving of certain rights to bury in vaults, &c.

IX. Although no burial ground in the parish has been closed by Order in Council, the inspector of the poor of any parish not within burgh, and the town clerk in the case of any parish within burgh, shall be bound, upon the requisition in writing of ten or more persons assessed for relief of the poor of the parish, or upon the requisition in writing of any two or more members of the parochial board of the parish, to convene a special meeting of the parochial board of such parish, for the purpose of determining whether a burial-ground shall be provided under this Act for the parish; and if a majority of such meeting of the parochial board shall resolve that a burial-ground shall be provided under this Act for the parish, such new burial-ground shall be provided in the same manner as if an old burial-ground had been closed by Order in Council.

Parochial Board to determine whether burial-ground shall be provided.

X. Whenever any burial-ground shall have been closed by Order in Council, the parochial board shall forthwith proceed to provide a suitable and convenient burial-ground for the parish, and to make arrangements for facilitating interments therein; and in the event of a suitable burial-ground not being provided by the parochial board within six months after such Order or requisition as aforesaid, it shall be lawful for such board, or for any ten or more persons assessed for relief of the poor in the parish, or any two or more members of the parochial board, to apply by summary petition to the Sheriff to have a suitable portion of land designated for the purpose of a burial-ground; and the Sheriff shall examine such witnesses and make such inquiry as he shall think proper, and shall keep a note of such evidence as may be adduced, and, if he

When burial-grounds closed, Board to provide suitable burial grounds, &c.

APPENDIX,
NO. II.

thinks fit, shall thereupon proceed to designate and set apart such portion as he may deem necessary of any lands in such parish suitable for the purpose, not being part of any policy, pleasure ground, or garden attached to any dwelling-house: Provided always, that due intimation shall have been given of not less than ten days to the owner of such lands, that he may be heard for his interest before such designation is actually made, subject always to an appeal to any of the Lords Ordinary of the Court of Session, whose decision shall be final, such appeal always being presented within fourteen days of the date of the Sheriff's judgment: And provided also, that no land shall be so designated nearer than one hundred yards to any dwelling-house without the consent in writing of the owner of such dwelling-house; and on such land being so designated the parochial board shall proceed to acquire the same in manner hereinafter provided.

Consent of
owners of
houses to new
burial-
grounds.

XI. Any burial ground may be provided under this Act either within or without the limits of the parish for which the same is provided; but no ground not already used as or appropriated for a cemetery shall be appropriated as a burial-ground, or as an addition to a burial-ground, under this Act, nearer than one hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house.

Acquisition of
land for
cemeteries, or
contracts with
cemetery com-
panies.

XII. For the providing such burial-ground, it shall be lawful for the parochial board of the parish to contract for and purchase or take any lands and buildings thereon for the purpose of forming a burial-ground, or for making additions to any burial-ground to be formed or purchased under this Act, as such board may think fit, or to purchase from any company or persons entitled thereto any cemetery or cemeteries, or part or parts thereof, subject to the rights in vaults and graves, and other subsisting rights which may have been previously granted therein: Provided always, that it shall be lawful for such board, in lieu of providing any such burial-ground, to contract with any such company or persons entitled as aforesaid for the interment in such cemetery or cemeteries, and either in any allotted part of such cemetery or cemeteries or otherwise, and upon such terms as the parochial board may think fit, of the bodies of persons who would have had rights of interment in the burial-grounds of such parish.

Certain pro-
visions of 8 and
9 Vict. c. 19,
incorporated
with this Act.

XIII. The Lands Clauses Consolidation (Scotland) Act, 1845, except the provisions of that Act "with respect to the provisions to be made for affording access to the special Act by all parties interested," shall be incorporated with this Act; and,

for the purposes of this Act, the expression "the promoters of the undertaking," wherever used in the said "Lands Clauses Consolidation (Scotland) Act, 1845, shall mean any parochial board under this Act: Provided always, that the provisions in the said Act "with respect to the purchase and taking of lands otherwise "than by agreement" shall have effect only in respect of such lands as the Sheriff of the county shall have designated as fitting for a burial ground in manner aforesaid: Provided further, that the provisions in the said Act "with respect to lands acquired by "the promoters of the undertaking under the provisions of this "or the special Act, or any Act incorporated therewith, but which "shall not be required for the purposes thereof," shall be held to apply only to such lands or portions thereof in which no burial shall have taken place, and such provisions shall not be restricted in operation to any fixed period after the purchase of such lands.

XIV. The parochial boards of any parishes which shall have respectively resolved to provide burial-grounds under this Act may concur in providing one burial-ground for the common use of such parishes, in such manner, not inconsistent with the provisions of this Act, as they shall mutually agree on, and may agree as to the proportions in which the expenses of such burial ground shall be borne by such parishes; and the proportion of each of such parishes of such expenses shall be raised by assessments in manner after mentioned; and, according and subject to the terms which shall have been so agreed on, the parochial boards for such parishes respectively shall, for the purpose of providing and managing such one burial-ground, and taking and holding land for the same, act as one joint board for all such parishes, and may have a joint office, clerk, and offices, and all the provisions of this Act shall apply to such joint board accordingly.

Burial ground
for the common
use of parishes.

XV. When any burial-ground shall have been provided in terms of this Act, such burial-ground shall, from and after such time as the Sheriff of the county shall appoint, be deemed the burial-ground, or part thereof, of the parish for which the same is provided; and where the same is provided for two or more parishes, such burial-ground, shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parish, subject to the provisions herein contained.

Burial-ground
to be the
burial-ground
of the parish or
parishes for
which it is pro-
vided.

APPENDIX,
NO. II.

Liabilities of
old burial-
grounds trans-
ferred to new
burial-
grounds.

Management
to be vested in
Parochial
Boards.

Sale of ex-
clusive right of
burial and
right to erect
monuments,
&c.

Conveyance of
bodies to
burial-ground.

Places for
reception of
bodies until
interment.

Regulations as
to burial-
grounds, &c.

XVI. Where any burial-ground shall be closed in terms of this Act, and a new burial-ground provided in place thereof, the whole burdens upon and liabilities attaching to the burial-ground so closed, shall be transferred to, and become burdens upon, the burial-ground provided in room thereof; and the revenues of the new burial-ground shall be liable for the same, in like manner as the revenues of the burial-ground so closed were liable.

XVII. The general management, regulation, and control of the burial-grounds provided under this Act shall, subject to the provisions of this Act and the regulations to be made thereunder, be vested in and exercised by the respective parochial boards providing the same.

XVIII. Any parochial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in such parts of any burial-ground provided by such board as may with the sanction of the Sheriff be appropriated to that purpose, and also the right of constructing any chapel, vault, or place of burial, with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, grave-stone, tablet, or monumental inscription in such burial-ground :
 [Repealed 49 and 50 Vict. c. 21, s. 1.]

XIX. Any parochial board may make such arrangements as they may from time to time think fit for facilitating the conveyance of the bodies of the dead from the parish or the place of death to the burial-ground which shall be provided under this Act, or to any other place of burial, subject to the provisions of this Act and the regulations to be made thereunder; and it shall be lawful for any of the aforesaid cemetery companies to undertake any such arrangement, and to carry the same into effect, subject to the provisions and regulations as aforesaid.

XX. It shall be lawful for any parochial board, subject to the provisions of this Act and the regulations to be made thereunder, to hire, take on lease, or otherwise to provide fit and proper places in which bodies may be received and taken care of previously to interment, and to make arrangements for the reception and care of the bodies to be deposited therein, and for providing such places such boards may exercise the powers vested in them under this Act for providing burial-grounds.

XXI. It shall be lawful for one of her Majesty's Principal Secretaries of State from time to time, to make such regulations in relation to the burial-grounds and places of reception of bodies

previous to interment which may be provided under this Act, as to him may seem proper for the protection of the public health and the maintenance of public decency ; and the parochial boards and all other persons having the care of such burial-grounds and places for the reception of bodies shall conform to and obey such regulations.

APPENDIX,
NO. II.

XXII. No funeral procession, or carriage in such procession, and no foot passenger, shall, while going to or returning from the place of interment on the occasion of any interment, be liable in any toll or pontage. Exemption of burials from toll.

XXIII. It shall be lawful for any parochial board to enclose, lay out, and embellish any burial-ground provided by such board in such manner as may be fitting and proper. Laying out burial-ground.

XXIV. Every parochial board under this Act shall, subject to the approval of the Sheriff of the county, fix and receive such fees and payments in respect of interments in any burial-ground provided by such board as they shall think fit, and from time to time revise and alter such fees and payments, and a table showing such fees and payments shall be printed and published, and shall be affixed and at all times continued on some conspicuous part of such burial-ground. Board to fix payments for interments.

XXV. The provisions of The Cemeteries Clauses Act, 1847, with respect to the protection of the cemetery, shall be incorporated with this Act, and be applicable to any burial-ground provided under this Act, and "the company" in these clauses shall signify the parochial board under this Act. Certain provisions of 10 and 11 Vict. c. 65, incorporated with this Act.

XXVI. The expenses incurred by the parochial board of any parish in carrying this Act into execution, in so far as the sums received for exclusive right of burial, or as fees or other payments in respect of interments shall be insufficient, shall be raised by assessment, to be levied in the same way as that which may be in force for the time being for the relief of the poor within the parish ; and the parochial board shall have like powers for the levying of such assessments as parochial boards have for the levying of assessments for the relief of the poor. Expenses to be paid by assessments.

XXVII. Provided always that it shall be lawful for the parochial board to borrow any money required for providing and laying out any burial-ground under this Act, and to charge the future assessments under this Act with the payment of such money and interest thereon : Provided, that there shall be paid in every year, in addition to the interest of the money borrowed and unpaid, not less than one-twentieth of the principal sum borrowed, until the whole is discharged. Power to borrow money.

APPENDIX,
NO. II.Loans from
Public Works
Loan Com-
missioners.

¹ XXVIII. [The commissioners for carrying into execution an Act of the session of Parliament holden in the fourteenth and fifteenth year of her Majesty, chapter twenty-three, "to authorise "for a further'period the advance of money out of the Consoli- "dated Fund to a limited amount for carrying on public works "and fisheries and employment of the poor," and the several Acts therein recited, mentioned, or referred to, and the Act or Acts subsequently passed for amending, continuing, or extending the same, may from time to time make to the parochial board of any parish, for the purposes of the Burial-Ground (Scotland) Act, 1855, any loan, under the provisions of the recited Act, or the several Acts therein recited or referred to, or subsequently passed for amending, continuing, or extending the same upon security of the assessments authorised by the said Burial-Ground Scotland Act, 1855.]

Minutes of
proceedings
and accounts.

XXIX. Minutes of all proceedings of the parochial board under this Act, with the names of the members who attend each meeting, shall be kept; and the parochial board shall provide and keep books in which shall be entered true and regular accounts of all sums of money received and paid for or on account of the purposes of this Act in the parish, and of all liabilities incurred by them for such purposes, and of the several purposes for which such sums of money are paid and such liabilities incurred; and all such books shall at all reasonable times be open to the examination of every member of the parochial board and ratepayer, without fee, and they may take copies of or extracts from such books or any part thereof, without paying for the same.

Board may ap-
point and re-
move officers,
&c.

XXX. The parochial board may appoint and may remove, at pleasure, a clerk and such other officers and servants as shall be necessary for the business of the board, in respect of and for the purposes of their burial-ground, and may appoint reasonable salaries, wages, and allowances for such clerk, officers, and servants, and, when necessary, may hire a sufficient office for transacting their business.

Register of
burials.

XXXI. All burials within any burial-ground provided under this Act shall be registered in a register book to be provided by the parochial board providing such ground, and kept for that purpose, and such register book shall be so kept by some officer

¹ Section 28 was repealed by 20 and 21 Vict. c. 42, s. 1, and the section as here printed was substituted for it. The loans are now granted by the Public Works Loan Commissioners. See 38 and 39 Vict. c. 89, which (s. 57) repeals 14 and 15 Vict. c. 23.

appointed by the said board to that duty; and in such register books shall be distinguished in what parts of the burial-ground the several bodies (the burials of which are entered in such register books) are buried, and in case such burial-ground has been provided for more than one parish, such register shall be kept or indexed so as to facilitate searches for entries in such books in respect of bodies from the several parishes, and such register books, or copies or extracts purporting to be thereof, shall be received in all courts as evidence of the burials entered therein.

APPENDIX,
NO. II.

XXXII. No interlocutor or deliverance of a Sheriff under this Act, excepting as herein provided, shall be in any way subject to review, or to be set aside by reason of any defect of form therein or in the procedure on which it followed.

Sheriff's
decision to be
final.

NO. III.

THE CHURCH OF SCOTLAND COURTS ACT, 1863.

26 and 27 Vict. c. 47, An ACT for removing Doubts as to the Powers of the Courts of the Church of Scotland, and extending the Powers of the said Courts. (13th July 1863.)

I. Whenever any Presbytery or other Court of the Church of Scotland shall have found a libel relevant, charging the minister of any parish with immoral conduct or with error in doctrine, and shall have resolved to proceed to a proof of the said libel, it is hereby declared and enacted that it is and shall be held to be the right of the said Presbytery to pronounce a deliverance requiring and enjoining such minister to abstain from the exercise and discharge of all ministerial functions of his office as minister of the parish until the libel shall have been fully investigated and finally disposed of; and in the event of an appeal against such deliverance, the same shall continue in force until the same shall have been recalled by the Court of Appeal; and the ordinances of religion in the said parish shall, so long as such deliverance is unrecalled, be administered in the same way as if the parish were vacant by the decease of the minister thereof: Provided always, that nothing herein contained shall affect the right of such minister to his stipend.

When a libel is found relevant against a minister, Presbytery may enjoin him to abstain from the discharge of his functions.

APPENDIX
NO. III.

When a minister has become insane, Presbytery to appoint an assistant.

II. When, in the course of any judicial process affecting the status of a minister, or on the representation of any party having interest, it has been established to the satisfaction of a Presbytery or other superior Court of the Church, on a certificate by the Sheriff of the county, which he is hereby authorised to grant after due investigation, that the minister of any parish is insane, and thereby disabled from discharging the duties of his office, it is hereby further declared and enacted, that it is and shall be the right of the Presbytery, unless an arrangement for the purposes after mentioned shall have been made on behalf of the said minister to the satisfaction of the Presbytery, to appoint a qualified assistant to perform the duties of the charge until the said minister shall be enabled to resume the same, or until the parish shall be declared vacant, and at the same time to apportion and fix, by their deliverance appointing such assistant, an allowance out of the stipend not exceeding one-half of the whole proceeds of the benefice, and which shall be payable so long as such assistant shall hold and continue to act on his appointment by the Presbytery; and such deliverance, when duly intimated to the heritors or others liable in payment of the stipend, shall be equivalent to a legal and completed assignation by the minister to such assistant of the portion of the stipend specified in the deliverance so long as the said deliverance shall subsist: Provided, that it shall at all times be competent to such minister to apply to the Presbytery to be restored to the duties of his office on the ground of his recovery, and the Presbytery, on being satisfied that such minister has recovered, shall recall the deliverance, and from the date of such recall all right and interest under the deliverance shall cease and determine.

Provision in case of a minister being suspended.

III. When, by their final sentence upon a libel, a Presbytery or other Church Court shall suspend a minister from the discharge of the duties of his office for a term specified in the said sentence, it is hereby further declared and enacted, that it is and shall be held to be the right of the Presbytery to appoint a qualified assistant to discharge the said duties, and to apportion and fix an allowance to such assistant out of the stipend not exceeding one-half of the whole proceeds of the benefice, and which shall be payable so long as such assistant shall hold and continue to act on his appointment by the Presbytery; and such sentence, when duly intimated to the heritors or others liable in payment of the stipend, shall be equivalent to a legal and completed assignation by the minister to such assistant of the proportion of the stipend specified in the sentence.

IV. Where in any cause depending before a Presbytery or other superior Court of the Church a proof shall have been allowed, it shall be lawful and competent for such Court to appoint a qualified person being an advocate, writer to the Signet, solicitor before the Supreme Courts, or a procurator duly entered as a practitioner in any Sheriff Court in Scotland, of not less than three years' standing, to sit with them for the purpose of dictating to the clerk of Court the evidence given by the witnesses examined in the course of the proof; and the oath *de fidei administratione officii* shall be administered by the moderator to any person so appointed; and it shall be lawful and competent for such Court, if it see fit, to appoint the evidence of the witnesses examined in the course of such proof to be taken down by a writer skilled in shorthand writing, to whom the oath *de fidei administratione officii* shall be administered; and the said shorthand writer shall afterwards, and within such time as may be fixed by the Court, write out in full the evidence so taken down by him in shorthand; and the extended notes, so written out, certified by the moderator and clerk of Court to be correct, shall be the record of the oral evidence in the cause: Provided always, that nothing herein contained shall prevent any Church Court, if it see fit, from taking down and recording the evidence adduced in any cause, according to the form hitherto in use.

APPENDIX,
No. III.
Church Court may appoint a person to dictate the evidence of witnesses or appoint a shorthand writer to take it down.

No. IV.

THE GLEBE LANDS (SCOTLAND) ACT, 1866.

29 and 30 Vict. c. 71, An ACT to facilitate the letting on Lease, feuing, or selling Glebe Lands in Scotland. (6th August 1866.)

I. This Act may be cited as "The Glebe Lands (Scotland) Act, Short title. "1866."

II. In this Act, unless there be something in the subject or Interpretation. context repugnant to such construction—

The word "minister" shall mean the minister of any parish in Scotland for the time who shall be in possession of a glebe:

The word "Presbytery" shall mean the Presbytery within the bounds of which such parish is situated:

The word "heritor" shall mean the proprietor of any lands

APPENDIX,
NO. IV.

within such parish to the extent of at least one hundred pounds of real rent from land yearly appearing in the valuation roll of the county within which such parish is situated :

The word "glebe" shall mean the lands appropriated to the minister as his glebe, and any additional lands settled in perpetuity on the minister for the time being, and enjoyed by him along with his glebe :

The word "Court" shall mean the Court of Session as commissioners for the plantation of kirks and valuation of teinds.

Power to ministers to grant leases of glebe for terms not exceeding eleven years.

III. A minister may, with consent and approval of the heritors and the Presbytery, grant a lease or leases of his glebe or any part or parts thereof, reserving for the use of the minister not less than five imperial acres nearest and most convenient to the manse, which shall be marked out by the heritors and the Presbytery for any term not exceeding eleven years, for such yearly rent or rents, and upon such condition or conditions as shall be approved of by the heritors and the Presbytery, but without any foregift or grassum, and under the special condition, if the said reserved five acres be included in the said lease, that such lease in so far as they are concerned shall cease and determine at the first term of Martinmas six months after the death, deprivation, resignation, or translation of the minister of the parish ; such consent and approval of the heritors and the Presbytery to be signified by a certificate written on the lease or leases, and signed by the clerk to the heritors and by the moderator and clerk of such Presbytery ; and the rent or rents payable under such lease or leases shall be paid and belong to the minister.

Power to sell servitudes or right of pasturage either for annual payment or absolutely.

IV. A minister may, with consent of the Presbytery and heritors, sell or dispose of, for such fixed annual payment in grain or in money as may be agreed on, any servitude or right of pasturage over any lands, which servitude or right of pasturage is possessed by him as minister of the parish : Provided always, that if the proprietor of the lands over which such servitude or right of pasturage exists elect to purchase it absolutely, the purchase-money shall be invested at the sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds shall direct, and the interests and proceeds only shall be paid to the minister.

Application to Court to grant feus or building leases.

V. Subject to the provisions of this Act, the minister may from time to time, with the consent of the Presbytery and of the heritors as hereinafter provided, make application to the Court by summary

petition for authority to feu his glebe, or any part thereof, or to grant building leases thereon for any term not exceeding ninety-nine years.

APPENDIX,
NO. IV.

VI. Previous to making any such application the minister shall intimate his intention so to do to the Presbytery by a letter addressed to the moderator, and shall transmit therewith a copy of the proposed application, which intimation and application shall be laid by the moderator before the Presbytery at their first meeting after receiving the same; and if the Presbytery are of opinion that it would be for the interests of the benefice that the glebe should be feued or let on building leases, they shall signify their consent to such application, subject to such conditions, if any, as they think necessary or advisable, by a certificate to that effect, written on a copy of the proposed application and signed by the moderator and clerk.

Consent of
Presbytery to
be obtained
before appli-
cation made.

VII. Upon such certificate being granted the minister shall call a meeting of heritors, such meeting to be summoned by intimation from the pulpit in the usual manner, and by notices, with a copy of the proposed application enclosed therein delivered or sent by post to each heritor or his known agent at least thirty days previous to the day on which such meeting is to take place within the parish, such meeting to be held on a day and at an hour and at a place to be specified in such citation and notices, and at such meeting every heritor may vote by proxy or by letter under his hand.

Also consent of
heritors.

VIII. At that meeting a copy of the proposed application to the Court shall be submitted to such meeting; and if approved of by two-thirds in value of the heritors of such parish, the clerk to the heritors shall grant a certificate to that effect under his hand to the minister.

Consent of
heritors, how
to be deter-
mined and
proved.

IX. Every such petition shall state the date of the petitioner's induction to the parish, the amount of the stipend and other sources of emolument attached to the living, the extent of the parish, the population according to the immediately preceding census, the nature and extent of the glebe, the purpose of the proposed feuing or granting building leases, the expected rate of feu-duty or rent, and the grounds on which the petitioner submits that benefit will arise to the minister and his successors in office by authority to feu or lease being granted; and there shall be produced therewith the certificate of the Presbytery and heritors and the form of feu charter or building lease proposed to be adopted.

Particulars to
be stated in
application.

X. The Court shall appoint the petition to be intimated in the minute-book and on the walls in common form, and to be served upon all proprietors of lands and heritages conterminous with the

Intimation to
be made of
application.

APPENDIX,
NO. IV.

lands proposed to be feued or leased for building; and shall also appoint notice of the petition to be inserted once in the *Edinburgh Gazette*, and once a week for three successive weeks in such local newspaper or newspapers as the Court may think proper.

Power of any
conterminous
proprietor to
object.

XI. It shall be in the power of any proprietor of lands or heritages conterminous with the lands proposed to be feued or leased for building to appear and object to the application being granted, on the ground of injury to the value or amenity of his said lands or heritages, and it shall be in the power of the Court, on considering such objections, to give effect thereto by refusing the application in whole or in part.

Court may
remit petition
for inquiry
into facts.

XII. After intimation and advertisement aforesaid the Court, on considering the petition, with or without answers from any party interested, may remit to such person or persons as they shall appoint to inquire into the facts stated in the petition, and to report his or their opinion or opinions thereon, and as to any conditions or restrictions subject to which the prayer of the petition should be granted.

Court may
grant authority
subject to cer-
tain condi-
tions.

XIII. The Court may, by order or interlocutor, and subject to any conditions or restrictions they may deem expedient, grant such authority, and shall in such order or interlocutor fix the minimum rate at which the glebe or any portion thereof shall be feued or leased for building, and shall authorise and empower the petitioner and his successors in office, at the sight of the heritors and the Presbytery, subject to the provisions of this Act, to grant and dispose of the glebe, or any part or parts thereof, in feu farm, fee, and heritage, for the highest feu-duties, or in building leases for the highest rent in grain or in money, that can be got for the same, not being less than the said minimum, and that either by public auction or private contract.

Court may
authorise con-
struction of
streets, &c.

XIV. The Court may also, on such application, authorise the minister to make and construct such streets, roads, passages, sewers, or drains in and through the glebe or any part thereof as the Court on inquiry may find reasonable or expedient, with the view of the more advantageous feuing or leasing thereof.

To whom feu-
duties, &c.
to be made
payable.

XV. The said feu-duties and rents, and the interest of any monies arising from any sale or sales in fee simple of any part or parts of the glebe invested as hereinafter provided, shall be taken payable to the minister and his successors in office serving the cure of the parish for the time, in all time thereafter, and be recoverable by him or them: Provided that on the death of any minister, his widow, heirs, or executors shall have right to and shall be

entitled to receive and discharge the said feu-duties and rents in the same manner and for the same length of time as is provided by the thirteenth Act of the third session of the second Parliament of Charles the Second, passed at Edinburgh the twenty-third day of August one thousand six hundred and seventy-two, intituled, "Act for the Ann due to the Executors of Bishops and Ministers," with regard to the stipend of the parish as ann; and provided further, that in the event of any circumstance causing a vacancy to be prolonged beyond the term during which such widow, heirs, or executors have a right to the said feu-duties and rents, it shall be lawful for the heritors of the parish and Presbytery of the bounds to uplift and to apply the said feu-duties and rents to the provision of spiritual superintendence and the supply of religious ordinances in the parish during the vacancy.

XVI. Subject to the provisions of this Act, the feu-duties which shall become payable under any contracts, dispositions, or charters of feu, or writs by progress, and the rents under any building leases, to be granted in virtue of this Act, shall in all time thereafter belong to the minister, and shall be held and enjoyed by him in lieu and place of the natural possession of such glebe, or the rents, mails, duties, and profits of the same, and subject always to the burden of payment of interest on the permanent burden after referred to, so long as it subsists: Provided that after feuing out or letting on building lease or selling the said subjects or any part thereof, in virtue of this Act, it shall not be competent for the minister or his successors in office, to make any demand upon the heritors, for providing him in a glebe or in any portion of land in lieu of the glebe land so feued, leased, or sold: Provided always, that nothing herein contained shall preclude or prejudice any claim which the minister may have to any additional glebe that might have been competent to him if this Act had not passed.

APPENDIX,
NO. IV.

Further provisions as to feu-duties.

XVII. When the Court shall have made an order or interlocutor granting authority to feu or let on building lease, and fixing the minimum feu-duty or rent, any proprietor whose lands are conterminous with the glebe mentioned in such order or interlocutor, may, within thirty days of the date of such order or interlocutor, intimate his willingness to feu or lease or to purchase so much of the said glebe at such a rate of feu-duty, or rent, or price as the Court may on a consideration of the whole circumstances of the case, and after directing such inquiry as they may consider necessary, determine; and if to feu or lease, undertaking to grant

Right of pre-emption by proprietors whose lands are conterminous with the glebe. Security to be given for feu-duty or rent. Payment and application of purchase money.

APPENDIX,
NO. IV.

security over the whole or such part of his estate, in addition to the said glebe itself, as to the Court shall seem necessary for the regular and punctual payment of the feu-duty or rent fixed by the Court; and on such intimation, and after such rate of feu-duty and security therefor, or price, shall have been so fixed, the Court shall, in case of feuing or leasing, interpose its authority to the bond or other writ in security, and decern accordingly, and in case of sale shall pronounce a decree of sale thereof in favour of such heritor, on which he shall be entitled to obtain a charter from the Crown for payment of a blench duty of a penny Scots, and interpose their authority accordingly: Provided always, that such heritor shall not be entitled to obtain an extract of the said decree of sale until the price shall be consigned in one of the chartered banks in Scotland for behoof of the minister; and in every case of such sale the price, after deduction of all expenses connected with the application to the Court, shall be invested at sight of the heritors and Presbytery on such securities and in such manner as the Court of Teinds shall direct, and the interest or proceeds only shall be paid to the minister: And it is provided further, that it shall be lawful for any heir of entail in Scotland to burden the lands and estate of which he or she is in possession as heir of entail lying contiguous to such glebe for the amount of such price, or to give security over the same for the annual payment out of the clear yearly rents and profits of the said lands and estate, the interest of such sum calculated at four and one-half per centum, or the amount of such annual payment, not exceeding three pounds per centum of such clear yearly rents and profits after deducting all prior burdens and provisions, as the same shall be ascertained by an average of the five years immediately preceding the date of creation of such burden or security.

Power to heirs of entail to charge their estates with sums payable.

Provisions for charging on the glebe the cost of the application to the Court and of making streets, &c.

XVIII. The Court, on the granting of any such order or interlocutor, or at any time thereafter, on the summary application of the minister on whose application the interlocutor or order was granted, or his heirs, executors, administrators or assignees, shall inquire into and ascertain the sums which shall have been paid as the costs, charges, and expenses of applying for and obtaining such order or interlocutor and incidental thereto, and of making and constructing streets, roads, passages, sewers, or drains in or through the glebe or any part thereof, and shall decern the amount thereof a permanent burden upon the glebe; and the interest thereof, until extinguished, as after provided or otherwise, shall form a first charge on the whole produce and revenue of the said glebe.

XIX. As long as any such burden shall remain unpaid, the casualties of superiority which shall become payable under any contracts, dispositions, or charters of feu, or writs by progress for entering heirs or successors to be granted as aforesaid, as well as any payments which may be received from the grantees thereof in respect of the construction of roads, sewers, or drains, shall be invested, at the sight of the heritors and Presbytery, on such securities and in such manner as the Court of Teinds shall approve, as a sinking fund to meet the said burden, and the interest of the said fund shall be paid to the minister for the time being; and as soon as the said fund shall amount to a sum sufficient to pay the said burden, the same shall be paid off; and thereupon the casualties of superiority thereafter to become due shall form part of the income of the minister for the time being, and be payable to him.

APPENDIX,
NO. IV.

Casualties of superiority and payments by grantees in respect of construction of roads, &c., to form a fund for paying off charge.

XX. The minister, with the consent of the heritors and the Presbytery, as certified by the clerk to the heritors and by the moderator and clerk of the Presbytery, shall grant, subscribe, and deliver to the feuar or feuars, purchaser or purchasers, lessee or lessees, all contracts, feu charters, dispositions in feu, writs of confirmation, resignation, *clare constat*, or acknowledgment, dispositions, conveyances, or other deeds or writs, containing all usual and necessary clauses for feudally conveying and vesting the subjects so feued, sold, or leased in the parties taking the same on feu or building lease, or purchasing the same, and to the heirs or singular successors who shall thereafter acquire right to the same; and the said contracts and other deeds or writs so to be granted shall be deemed and held to be as legal and valid titles of property in feu and heritage, or fee simple, or lease (as the case may be) of the properties so feued or conveyed to the several persons in whose favour respectively the same shall be granted, and their heirs and disponees, as if granted by a proprietor or superior with a completed feudal title holding immediately of the Crown, and the subjects so feued or conveyed or leased under the authority of this Act shall be subject to payment of poor rates, any law or custom to the contrary notwithstanding; and the said contracts and other deeds shall be recorded in the books of the heritors.

Title, how to be granted, Subjects feued, &c. to be subject to poor rates.

XXI. In all and each of the said contracts and other deeds or writs the full value of the ground thereby feued or leased shall be stipulated to be paid in perpetual annual feu-duties, or rents for the endurance of such building leases, in grain or in money, payable half-yearly, without taking any sum or sums of money, or

Full value to be stipulated to be paid without taking money by way of fine, &c. Casualties of

APPENDIX,
NO. IV.

superiority,
how to be
taxed. Feu-
duties, &c. to
be secured on
lands.

Minister
to enjoy same
privilege as
other
superiors.
Rights of
parties taking
lands in feu.

Court to pass
Acts of
Sederunt.

Saving for
existing Acts
authorising the
feuing of
glebes.

other matter or thing whatsoever, by way of fine, foregift, or grassum ; and all casualties of superiority accruing on the renewal of the title to heirs or singular successors shall be taxed as a duplicate of the annual feu-duty ; and all feu-duties, casualties, or rents shall be properly and legally secured upon the ground for which the same are payable, and on the buildings that may be erected thereon, under the usual penalties and forfeitures according to the law and practice of Scotland in feu holdings.

XXII. After any such contracts and other deeds or writs shall have been executed, the minister shall have and enjoy all the same remedies for enforcing payment of the said feu-duties and casualties of superiority thereby stipulated and agreed to be paid, and generally all other rights and privileges which by the law and practice of Scotland belong and are competent to other superiors in feu holdings ; and the parties taking any lands in feu under the provisions of this Act, and their heirs and successors, shall have and enjoy all the rights and privileges which by the law and practice of Scotland belong and are competent to vassals in feu holdings, in the same manner and to the same effect as if they held the said lands of and under the minister as a superior holding immediately of the Crown.

XXIII. The Court shall pass such Acts of Sederunt as they may consider necessary to regulate the form of procedure to be adopted under this Act for effectually carrying out the purposes thereof.

XXIV. This Act shall not affect any Act of Parliament now in existence affecting the feuing of glebes in Scotland, or anything done or contracted to be done thereunder.

No. V.

THE UNITED PARISHES (SCOTLAND) ACT, 1868.

31 and 32 Vict. c. 30, An ACT to amend the Act of the Seventh and Eighth Years of the Reign of Victoria, Chapter Forty-four, relating to the Formation of *quoad sacra* Parishes in Scotland. (29th May 1868.)

I. [*Repealed 38 and 39 Vict. c. 66 (S.L.R.).*]

II. Whenever, in the case of any united parish, containing two or more parish churches, any persons have undertaken to endow one of the said churches along with a district, being part of such united parish, to be attached thereto, it shall be competent for them to apply for the disjunction of such district, and for the erection of it into a parish *quoad sacra*, in terms of the eighth section of the said first-recited Act, and for the Court to entertain and dispose of such application in the same manner and to the same effect as if the persons applying for such disjunction and erection had, at his, her, or their expense, built or acquired, or undertaken to build or acquire, a church, in order to its being erected into a parish church in connection with the Church of Scotland: Provided also, that it shall not be necessary for the persons applying for such disjunction and erection to make any provision for the maintenance of the fabric of the church which they shall have undertaken to endow as aforesaid.

APPENDIX,
NO V.

Application
for erection
of separate
parish *quoad
sacra*.

III. It shall be competent for the Court, in pronouncing decree of disjunction and erection in an application presented under the preceding section, to declare that the church undertaken to be endowed shall, from and after the date of the decree, be the parish church of the newly erected parish, and the said church shall thereafter be the parish church of the said newly erected parish; and the minister and kirk-session of the newly erected parish *quoad sacra* shall be invested with all those rights in relation to the church of the newly erected parish which were formerly vested in the minister and kirk-session of the said united parish.

Court may
declare the
church to be
endowed to be
the church of
the new parish.

IV. The church which shall be declared as aforesaid to be the church of the newly erected parish *quoad sacra* shall not be subject to the provisions of any trust constituted in terms of the first-recited Act, or to any trust applicable to a church erected by voluntary contributions as the church of a parish *quoad sacra*.

Church not
to be subject
to any trust in
terms of first-
recited Act.

V. Nothing in this Act shall increase or affect the existing liabilities of the heritors in any parish.

Liabilities of
heritors not to
be increased.

VI. This Act shall be deemed to be incorporated with the first-recited Act, and the said first-recited Act shall be read and have effect accordingly.

Construction.

VII. This Act may for all purposes be cited as "The United Short Title. Parishes (Scotland) Act, 1868."

APPENDIX,
NO. VI.

No. VI.

THE ECCLESIASTICAL BUILDINGS AND GLEBES (SCOTLAND) ACT,
1868.

31 and 32 Vict. c. 96, An ACT to amend the Procedure in regard
to Ecclesiastical Buildings and Glebes in Scotland. (31st
July 1868.)

Interpretation
of terms.

I. Where not inconsistent with the context, the following
expressions shall in this Act have the meanings hereinafter assigned
to them :—

The expression “church” shall include all necessary fencing of
the site whereon the church is built, in so far as the heritors
are now by law bound to provide the same :

The expression “manse” shall include all necessary and usual
offices, garden, and garden walls, which the heritors are now
by law bound to provide :

The expression “parish” shall include united parishes :

The expression “glebe” shall include grass glebe or minister’s
grass :

The expression “lands and heritages” shall have the meaning
assigned to it in the Lands Valuation (Scotland) Act,
1854.

The expression “the Lord Ordinary” shall mean the Lord
Ordinary in Teind causes in the Court of Session :

The expression “Sheriff” shall include Sheriff-substitute :

The expression “heritor” shall mean any proprietor of lands
and heritages at present liable in the assessments which may
be imposed according to the real or valued rents thereof, as
the case may be, for the purposes set forth in the third
section hereof :

The expression “valued rent” shall in the county and lordship
of Zetland mean and include “number of merks land.”

Short title.

II. This Act may be cited as “The Ecclesiastical Buildings and
“Glebes (Scotland) Act.”

Heritor or
minister dis-
satisfied with
determination
of Presbytery
in regard to
church, manse,

III. If, in the course of any proceedings before any Presbytery
of the Church of Scotland relating to the building, rebuilding,
repairing, adding to, or other alteration of churches or manses, or
to the designing or excambing of sites therefor, or to the designing
or excambing of glebes, or additions to glebes, or to the designing

or exclaiming of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), any heritor or the minister of the parish shall be dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by such Presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceedings by appealing the whole cause as hereinafter provided; and such appeal, on being duly intimated to the clerk of the said Presbytery shall have the effect of staying the Presbytery from taking any further steps in connection with said proceedings: Provided always, that if no such appeal is taken and duly intimated within the period foresaid, every such order, finding, judgment, interlocutor, or decree not appealed from as aforesaid shall be final and not subject to review: Provided also, that if the heritor or minister taking any appeal as aforesaid shall unduly delay to follow forth the same, it shall be competent for any other heritor, or for the minister of the parish, or for the clerk of the Presbytery of the bounds by the authority of the said Presbytery, or for the clerk of the heritors by the authority of the heritors, to sist himself as a party to said appeal, and to follow forth the same as the original appellants could have done.

APPENDIX,
NO VI.
glebe, &c. may
stay proceedings
by appeal
to sheriff.

IV. An appeal under this Act shall be taken by the appellant or his agent presenting a summary petition to the Sheriff of the county in which the parish concerned is situated, praying him to stay the proceedings before the Presbytery, and to dispose of the same himself: Provided, that where the parish is situated within more than one county the petition may be presented to the Sheriff of either county; and the Sheriff to whom the first application is made shall have the same power, authority, and jurisdiction as if the whole of the parish were situated within his county.

Appeal how to
be taken.

V. All appeals under this Act shall, within ten days of their presentation be intimated by circular, transmitted by the appellant or his agent through the Post Office, addressed to each heritor or his known factor or agent, to the clerk of the heritors, if there be such clerk, to the minister of the parish (if the benefice is full at the time), and to the clerk of the Presbytery of the bounds: Provided always, that where the number of heritors of the parish exceeds forty, it shall not be necessary to address a circular to each heritor or his factor or agent, but it shall be sufficient if a copy of the petition of appeal is affixed to the most patent door of the church for two successive Sundays next following the presentation of the

Intimation of
appeal.

APPENDIX,
NO. VI.

Sheriff to inquire as to intimation, and order it if not duly made, and hear the parties without written pleadings, unless specially ordered.

Proceedings for rebuilding of church or manse.

Proceedings for building or repairing of church or manse.

Order of Sheriff for rebuilding or repair of church or manse.

petition, and if notice of the presentation of the petition is inserted in a newspaper circulating in the county during each of two successive weeks.

VI. Upon any petition of appeal under this Act being considered by the Sheriff, he shall satisfy himself that the intimation before mentioned has been made, and, if not duly made, he shall order such intimation as he shall consider necessary, and thereafter he shall inquire into the circumstances, and hear the parties, by themselves or their agents, without any written pleadings, unless the same shall be specially ordered by him; but he shall take a note of the proceedings and of any evidence which may be laid before him, and shall dispose of the petition as shall be just.

VII. In any proceedings for the rebuilding of a church or manse the Sheriff shall, unless the matter has been decided by the Presbytery by a judgment or finding final under the third section hereof, *primo loco*, consider whether, in accordance with the law as at present existing, a new edifice should be erected, or whether the existing buildings should be repaired, and for that purpose he may take such evidence and make such remits to architects or other professional persons as he shall think right, and he shall pronounce a finding accordingly: Provided always, that, if the Sheriff see cause, he may dismiss the petition.

VIII. In any proceedings for the building or repairing of a church or manse, the Sheriff shall inquire, with such assistance of architects or other professional persons as he shall think proper, into the truth of the allegations contained in the petition; and if he shall be satisfied that, in accordance with the law as at present existing, a church or manse should be built, or that repairs are necessary, he shall pronounce a finding accordingly: Provided always, that, if he see cause, the Sheriff may dismiss the petition.

IX. Where the Sheriff shall find that, in accordance with the law as at present existing, a church or manse must be built, rebuilt, or repaired, but the heritors shall delay or refuse to give effect to it, he shall remit to an architect or other professional person to prepare plans and specifications for such building, rebuilding, or repairs, and after hearing any objections thereto he shall approve of or modify the same, and ordain the same to be executed, and, if need be, he shall remit to an architect or other professional person to receive tenders for the execution of said plans and specifications, to accept of such tenders as shall seem best, and to superintend their execution; and the Sheriff shall find the heritors who are now liable in the expense of such building, rebuilding, or

repairs, and shall assess and allocate the same, together with a sufficient sum to cover the expenses of collection upon them, according to their respective real rents, as these shall appear on the valuation roll or rolls in force at the date of such assessment and allocation, or according to their valued rents, as the case may be, and shall grant decree for payment thereof in such instalments and under such conditions as he shall direct.

APPENDIX,
NO. VI.

X. In any proceedings for building or repairing churchyard walls, the Sheriff shall inquire as to the truth of the petitioner's allegations, and if he shall find that the walls should be built or repaired, but the heritors shall refuse or delay to give effect to such finding, he shall remit to some person to prepare the necessary specifications (on which, if required, he shall hear parties), and he shall approve of or modify the same, and, if need be, remit to some person to take and accept tenders, and superintend the execution thereof, and he shall assess, allocate, and decern for the expenses thereof, as in the case of building, rebuilding, or repairing a church or manse.

Building or repairing churchyard walls.

XI. In any proceedings for designing a glebe or churchyard, or the site of a church or manse, or additions to any of the same, or for excambing a glebe, churchyard, site of a church or manse, or any portions thereof, the Sheriff shall inquire into the truth of the petitioner's allegations, and for that purpose may take such evidence, and make such remits to land valuers, surveyors, or other persons of skill, as shall seem necessary, and shall dispose of the petition in accordance with the law as at present existing, and shall assess and allocate the expense of acquiring land (including any buildings thereon) for such glebe or churchyard, or for the site of such church or manse, or for additions to any of the same, and decern therefor, as in the case of building, rebuilding, or repairing a church or manse: Provided always, that the Sheriff's decree of designation or excambion shall have the same force and effect as a decree of designation or excambion pronounced by a Presbytery before the passing of this Act, except as hereinafter provided: Provided also, that it shall not be competent for the Sheriff to pronounce any decree of excambion, unless it shall appear, under the hand of the clerk of the Presbytery of the bounds, that the Presbytery have given their consent to such excambion.

Designing glebe or churchyard, or site of church or manse, or for excambing glebe, &c.

XII. After the completion of the works ordered in the course of any proceedings for the building, rebuilding, or repairing of any manse, it shall be competent for any heritor of the parish to move the Sheriff to declare it a "free manse;" and if the Sheriff shall be

Mode of declaring a "free manse." Duration of decree so declared.

APPENDIX,
NO. VI.
—

Sheriff if
required
personally
to inspect
premises or
locality.

Decrees, &c.
of Sheriff to
be final
unless
appealed from
to Lord
Ordinary.

Expenses.

Form of
note of
Appeal to
Lord Ordinary.

No appeal
after twenty
days from
date of
judgment, &c.
Extract may
be given out
after twenty
days if no
appeal.

satisfied that the manse is in a state of thorough repair, he shall find and declare accordingly, and his decree shall have the same force and effect as a decree in similar terms pronounced by a Presbytery before the passing of this Act would have had : Provided always, that such decree shall have effect only till the expiration of fifteen years from its date, or until the appointment of a new minister to the parish, whichever event shall first happen.

XIII. In any proceedings for the building, rebuilding, or repairing of any church or manse, or for the designation of any glebe, churchyard, site of any church or manse, or of any additions thereto, or for the excambion of any glebe, churchyard, site of any church or manse, or of any portions thereof, it shall be competent for the parties, or any of them, to require the Sheriff to make a personal inspection of the premises or locality, as the case may be ; and the Sheriff shall comply with such requisition.

XIV. All orders, findings, judgments, interlocutors, or decrees pronounced by any Sheriff under the authority of this Act shall be final and conclusive, and not subject to review by any court whatsoever, unless an appeal shall be taken to the Lord Ordinary against the same in manner hereinafter mentioned.

XV. The Lord Ordinary or the Sheriff, as the case may be, shall be entitled to dispose of all questions of expenses, and to grant decree therefor.

XVI. An appeal to the Lord Ordinary under this Act may, when otherwise competent, be taken by a note of appeal written at the end or on the margin of the order, finding, judgment, interlocutor, or decree appealed from, or by a separate note of appeal lodged with the sheriff-clerk ; and such note of appeal may be in the following or similar terms :—

“ The petitioner [*or* respondent] appeals to the Lord Ordinary
“ in Teind Causes.”

And the said note shall be signed by the appellant or his agent, and shall bear the date on which it is signed.

XVII. It shall not be competent to take or sign any note of appeal after the expiration of twenty days from the date of the order, finding, judgment, interlocutor, or decree complained of in any proceedings before the Sheriff under this Act, and during such period of twenty days extract shall not be competent ; but on the expiration of the foresaid period, if no appeal shall have been taken, the clerk of Court may give out the extract.

XVIII. Such appeal shall be effectual to submit to the review of the Lord Ordinary the whole orders, findings, interlocutors,

judgments, or decrees pronounced by the Sheriff in the cause in so far as not final as hereinbefore provided, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Lord Ordinary to do complete justice without the necessity of any counter appeal; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the Lord Ordinary; and an appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself.

XIX. The Sheriff-clerk shall, within two days after the date of any appeal being taken, send written notice of such appeal to the respondent or his agent: Provided that the failure to give such notice shall not invalidate the appeal; but the Lord Ordinary may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper.

XX. Within two days after the appeal shall have been taken the sheriff-clerk shall transmit the process to the depute-clerk of Session attached to the Bar of the Lord Ordinary, who shall subjoin to the appeal a note of the day on which it is received; and it shall be lawful for either the appellant or the respondent at any time after the expiry of eight days from the date of such note to enrol the appeal; and when the appeal is called in the roll, it shall be competent for the Lord Ordinary to order the note of appeal and any other papers or productions to be printed, or the Lord Ordinary may dispense with the printing of the same; and in case the papers ordered to be printed shall not be printed by the appellant, or in case he shall not move in the appeal, it shall be lawful for the Lord Ordinary, on a motion by any other party in the cause, to grant an order authorising the party moving to print the papers aforesaid, and to insist in the appeal as if it had been taken by himself: Provided always, that when any appeal is taken to the Lord Ordinary he shall have the whole powers which are hereinbefore conferred on the Sheriff: Provided also, that all orders, findings, interlocutors, judgments, or decrees pronounced by the Lord Ordinary shall be final and not subject to review.

XXI. The provisions of the Lands Clauses Consolidation (Scotland) Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, with respect to the purchase and taking of lands by agreement, or otherwise than by agreement, shall be incorporated with this Act; and for the purposes of this Act the expression "the promoters of the undertaking," wherever used

APPENDIX,
NO. VI.

Effect of appeals under this Act. Appeal not to be withdrawn or abandoned without leave.

Notice of appeal to be sent to respondent.

Form of bringing appeals to Lord Ordinary, and powers of Lord Ordinary to order printing of papers, &c. Decision on appeal to be final.

Purchase of lands.

APPENDIX,
NO. VI.

in the said Acts, shall mean the heritors of any parish under this Act: Provided always, that the provisions in the said Acts "with respect to the purchase and taking of lands otherwise than by agreement" shall have effect only in respect of such lands as the Sheriff of the county shall have designated as above provided for: Provided farther, that the provisions in the said Acts with respect to lands acquired "by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof," shall not be restricted in operation to any fixed period after the purchase of such lands.

Mode of
calling meet-
ing of heritors.

XXII. Notwithstanding any law, statute, or usage to the contrary, meetings of heritors for any purpose whatsoever may be called in the following manner; that is to say, on the requisition of the clerk of the heritors, or of any heritor or heritors possessed of lands yielding one-fourth part of the total real rental of the parish as the same shall appear on the valuation roll or rolls then in force, or valued at one-fourth part of the total valued rent of such parish, as the case may be, or when he shall himself think such meeting expedient or necessary, the minister of the parish shall cause an intimation of the meeting to be given immediately after divine service in the forenoon, and circular letters containing a similar intimation to be sent to all heritors of the parish at least twenty-one free days before such meeting shall take place: Provided, that where in any parish the number of heritors exceeds forty, it shall not be necessary to send circular letters as before provided, but in lieu thereof intimation of the meeting shall be given by the minister by advertisement in a newspaper circulating in the county once during each of two successive weeks between the intimation from the pulpit before mentioned and the day for which the meeting has been called.

All assess-
ments for
building or
rebuilding
churches or
mansees, &c.
to be imposed
according to
yearly value in
valuation lists
or valued rent.

XXIII. All assessments for the purpose of defraying expenses connected with the building, rebuilding, or repairing of churches or mansees, or the designing or excambing of sites therefor, or the designing or excambing of glebes or additions to glebes, or the designing or excambing of sites for additions to churchyards, and the suitable maintenance thereof (including the building, rebuilding, or repairing of churchyard walls), in any parish, shall be imposed in manner after mentioned upon all lands and heritages within such parish according to the yearly value thereof as the same shall appear on the valuation roll or rolls in force in such parish at the time when such assessments are made, or according to the valued rent of

such lands and heritages, as the case may be ; and such assessments shall be imposed and recovered according to the present law and practice : Provided always, that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent.

APPENDIX,
NO. VI.

XXIV. Nothing herein contained shall have the effect of extending or increasing the burdens which now by law rest upon the minister or heritors of any parish in respect of any of the matters above set forth. Nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment.

Act not to increase existing burdens or affect existing exemptions or liabilities.

XXV. [*Repealed 38 and 39 Vict. c. 66 (S.L.R.).*]

No. VII.

THE CHURCH PATRONAGE (SCOTLAND) ACT, 1874.¹

37 and 38 Vict. c. 82, An Act to alter and amend the Laws relating to the Appointment of Ministers to Parishes in Scotland.

(7th August 1874.)

[*Preamble.*]

I. This Act shall apply to Scotland only.

Extent of Act.

[II. Except in so far as otherwise expressly provided, this Act shall come into operation on the first day of January one thousand eight hundred and seventy-five, which date is herein-after referred to as the commencement of this Act.]

Commencement of Act.

III. [From and after the commencement of this Act, the said Acts of the tenth year of the reign of her Majesty Queen Anne, chapter twelve, and the sixth and seventh years of the reign of her present Majesty, chapter sixty-one, shall be repealed, and] the right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congrega-

[Repeal of Acts 10 Anne, c. 12, and 6 and 7 Vict. c. 61.]

Appointment of ministers in future.

¹ Parts of this statute have been repealed by the Statute Law Revision Acts 46 and 47 Vict. c. 39, and 56 and 57 Vict. c. 54, but the whole Act is here printed, the repeal of the Compensation Clauses having been a strange vagary of the Statute Law Revisers.

APPENDIX,
NO. VII.

tion, and of conducting the election and of making the appointment by the congregation as may from time to time be framed by the General Assembly of the Church of Scotland, [or which after the passing of this Act, but before the next meeting of the said General Assembly, may be framed by the Commission of the last General Assembly duly convened for the purpose of making interim regulations thereanent]: Provided always, that, with respect to the admission and settlement of ministers appointed in terms of this Act, nothing herein contained shall affect or prejudice the right of the said Church, in the exercise of its undoubted powers, to try the qualifications of persons appointed to vacant parishes; and the courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof. The ministers appointed, admitted, and settled in terms of this Act are hereby declared to have in all respects the same rights, privileges, and duties which now belong to or are incumbent on the ministers of the said Church.

[Compensation
to private
patrons.]

IV. [In all cases in which the patronage of a parish is held either solely or jointly by a private patron, or any guardian or trustee on his behalf, it shall be lawful for him, or for such guardian or trustee, at any time within six months after the passing of this Act, to present a petition to the sheriff of the county (and when the parish is partly in two or more counties, the petition may be presented to the sheriff of any one of such counties), praying him to determine the compensation to be paid to such patron in respect of the operation of this Act; but it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee simple title or under a deed of entail or other limited title, to present such petition; and if no such petition shall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be competent in any manner of way. No compensation in respect of the operation of this Act shall be paid to her Majesty, or to any patron other than a private patron.]

[Procedure
before Sheriff.]

V. [Upon any petition for the determination of the compensation payable under this Act being presented, the Sheriff shall order it to be intimated to the minister of the parish to which the petition relates, and to the clerk of the presbytery of the bounds, and, after the expiry of the *inducie* of twenty-one days, whether with or without answers, shall first inquire as to the title of the petitioner,

and, if he shall be satisfied thereof, he shall proceed to determine the amount of such compensation, which shall be equal to one year's stipend of the parish to which the petition relates when the petitioner is sole patron, and such proportion thereof as to the Sheriff shall seem just when the petitioner is a joint patron; and the Sheriff shall pronounce an interlocutor finding and declaring that, on the occurrence of a vacancy in the parish, the petitioner, or those in his right, shall be entitled, unless the sum shall be otherwise provided, to receive from the heritors payment of the amount of compensation found due, by four equal yearly instalments out of the first four years stipend, which, but for the passing of this Act, would have been wholly payable by them to the minister to be appointed on the occurrence of said vacancy, or his successor in such parish, or in the case of the appointment of an assistant and successor out of the first four years stipend, which, but for the passing of this Act, would have been wholly payable after the date of such appointment to the minister of such parish; and the petitioner, or those in his right, shall have the same or the like remedies for recovery of said compensation which a minister has for the recovery of his stipend: Provided that where the patron is himself an heritor of the parish he shall be entitled to retain and appropriate the sum or sums of stipend which, had he not been himself the patron, would under the operation of this Act have been payable by him to the patron of the parish.]

VI. [The interlocutors or judgments of the sheriff pronounced under this Act shall not be subject to review by any superior court, but where they have been pronounced by the sheriff-substitute or steward-substitute, they shall be subject to review by the sheriff or steward: Provided always, that it shall be competent for the Court of Session by act of sederunt to regulate the proceedings before the sheriff under this Act.] [Sheriff's judgments final.]

VII. (1.) If on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tantum jure devoluto*: Appointment by presbytery *tantum jure devoluto*.

(2.) [If at any time after the passing of this Act, and prior to the first day of July one thousand eight hundred and seventy-five, it shall appear to the presbytery of the bounds that the number of the communicants of any vacant church and parish to which no presentation has been issued before the passing hereof is less than Provision for case of small congregations.

APPENDIX,
NO. VII.

Repeal of
inconsistent
statutes.

twenty-five, it shall not be lawful to take any proceedings for the appointment, admission, and settlement of a minister until after the said first day of July one thousand eight hundred and seventy-five; the *jus devolutum* in the case of any such vacancy shall not come into operation until after the first day of September one thousand eight hundred and seventy-five, although more than six months may have elapsed from the occurrence of such vacancy.]

VIII. All laws, statutes, and usages inconsistent with this Act are hereby repealed; but nothing in this Act contained shall affect or interfere with the appointment of the minister first appointed as the minister of any new parish *quoad sacra*, or the right to teind now possessed by or competent to any patron or titular, or the right of ann, or the laws now in force in regard to the disposal of vacant stipends; [nor shall anything contained in this Act, except the provisions of the second sub-section of section seven, affect or interfere with any proceedings following upon or arising out of a presentation issued before the commencement of this Act.]

Interpretation
clause.

IX. The word "minister" shall include assistant and successor; [the word "guardian" shall include tutors and curators of pupils or minors or of persons labouring under incapacity or disability, and factors *loco tutoris* and factors *loco absentis*; the word "sheriff" shall include steward, sheriff-substitute, and steward-substitute; the words "one year's stipend" shall be construed to mean the sum which, on an average of the three preceding years, the minister has received in name of stipend out of the teinds of the parish; the words "private patron" shall mean and include all patrons of churches and parishes, whether single or joint, other than her Majesty and her royal successors, and burgh corporations, universities, or trustees constituted commissioners, officers, or persons acting in a public capacity]; the word "parish" shall include united parishes, and also parishes *quoad sacra* as well as parishes *quoad omnia*, and where in any church and parish there is more than one benefice, each benefice shall be dealt with and regarded as if it were a separate parish; the words "vacancy" and "vacant" shall include and refer to the occasion of the appointment of an assistant and successor, as well as the occasion of an ordinary vacancy; the word "congregation" shall mean and include communicants and such other adherents of the church as the kirk-session under regulations to be framed by the General Assembly or Commission thereof, as provided in the third section hereof, may determine to be members of the congregation for the purposes of this Act; ["heritors" shall mean heritors liable in payment of stipend].

No. VIII.

APPENDIX,
NO. VIII.

THE UNITED PARISHES (SCOTLAND) ACT, 1876.

7 and 8 Vict.
c. 44.

39 and 40 Vict. c. 11, An ACT to amend the Act of the Seventh and Eighth Years of Her Majesty, Chapter Forty-four, relating to the Formation of *quoad sacra* Parishes in Scotland. (1st June 1876.)

(Preamble.)

I. This Act may for all purposes be cited as the United Parishes (Scotland) Act, 1876. Short title.

II. The expression "Court of Teinds" shall mean the Lords of Council and Session acting in their capacity of commissioners for the plantation of kirks and valuation of teinds. Definitions.

The expression "glebe" shall include grass glebe or minister's grass, and any land settled in perpetuity on the minister for the time being.

III. If in the course of any proceedings under the recited Act for the disjunction of a portion of a united parish in Scotland, and for its erection into a parish *quoad sacra*, it shall appear that there is more than one glebe forming part of the benefice of such united parish, it shall be lawful for the Court of Teinds, upon sufficient evidence being produced of the consent of Presbytery, in pronouncing decree of disjunction and erection, to declare that one of such glebes, duly described by its marches and boundaries and with its parts and pertinents, shall be transferred from the minister of such united parish to the minister of such parish *quoad sacra*, and such glebe shall thereafter be the glebe of the said parish *quoad sacra*, and the minister thereof shall be invested with all those rights in relation thereto which were formerly vested in the minister of the said united parish: Provided always that the right to the personal occupancy and enjoyment of such glebe as aforesaid shall continue with the minister of the said united parish in office at the date of such decree during his incumbency, unless he shall, by a deed duly executed and lodged with the clerk of the presbytery, renounce the same. Power of Court to declare one of the glebes of united parish to be the glebe of new parish.

IV. If a portion of a united parish in Scotland has under the provisions of the recited Act been erected into a parish *quoad sacra*, and it shall appear in the course of any proceedings taken under this Act that there is more than one glebe forming part of the benefice of such united parish, it shall be lawful for the Court of Teinds, upon sufficient evidence being produced of the consent of the Presbytery, to decern and declare that one of such glebes, duly Provision in case benefice of united parish comprises more than one glebe.

APPENDIX,
NO. VIII.

described by its marches and boundaries and with its parts and pertinents, shall be transferred from the minister of such united parish to the minister of such parish *quoad sacra*, and such glebe shall thereafter be the glebe of the said parish *quoad sacra*, and the minister thereof shall be invested with all those rights in relation thereto which were formerly vested in the minister of the said united parish: Provided always, that the right to the personal occupancy and enjoyment of such glebe as aforesaid shall continue with the minister of the said united parish in office at the date of such decree during his incumbency, unless he shall, by a deed duly executed and lodged with the clerk of the presbytery, renounce the same.

Glebe not to be
subject to
trust.

V. The glebe which shall be declared as aforesaid to be the glebe of the parish erected *quoad sacra*, shall not be subject to the provisions of any trust constituted in terms of the recited Act, subject to this proviso, that if a manse and offices are erected on such glebe, either before or after decree of disjunction and erection or decree as aforesaid, the site of such manse and offices shall be subject to the provisions of any trusts constituted in terms of said recited Act.

Saving for
heritors.

VI. Nothing in this Act shall increase or affect the existing liabilities of the heritors in any parish.

Construction.

VII. This Act shall be deemed to be incorporated with the recited Act, and the recited Act shall be read and construed accordingly.

NO. IX.

LOCAL GOVERNMENT (SCOTLAND) ACT, 1894.

57 & 58 Vict. c. 58.

PART V.—PARISH TRUSTS.

Powers of
parish councils
over parish
charities and
churchyards.

XXX. (1.) When trustees hold any property wholly or mainly for the benefit of the inhabitants of a single parish or any of them, as such inhabitants, or for any public purpose connected with a single parish other than—

(a) for an ecclesiastical charity;¹

45 and 46 Vict.
c. 59.

(b) for an educational endowment within the meaning of the Educational Endowments (Scotland) Act, 1882; or

8 and 9 Vict.
c. 88.

(c) for the use or benefit of the poor of the parish within the meaning of section fifty-two of the Poor Law (Scotland) Act, 1845;

¹ See page 602 for definition of "Ecclesiastical Charity."

they may transfer the property to the parish council of the parish, or to persons to be from time to time appointed by that council, and the parish council, if they accept the transfer, or persons whom they appoint, shall hold the property on the trusts and subject to the conditions on which the trustees hold the same.

(2.) In the event of any such property not being transferred to the parish council under and subject to the provisions of the preceding sub-section, the parish council of the parish concerned may from time to time appoint such number of additional persons to act along with the trustees of the said property, as the trustees and the parish council may agree upon, or in default of such agreement as may be approved by the Board in each case: provided that where the trustees of any such property are elected by, or include persons elected by, parish electors or inhabitants of the parish, or are members of the county or town council, or are burgh commissioners, the provisions of this sub-section shall not apply unless the Board by order so prescribe.

(3.) Where the trustees of any such property are the kirk-session, or the heritors and kirk-session, of any parish, or the kirk-session or deacons' court, or managers, or vestry of a congregation belonging to any religious denomination to the number, whether alone or conjoined with others, of not less than six persons, the said trustees shall from time to time appoint certain of their own number, not exceeding three, and the parish council of the parish shall from time to time appoint such number of additional persons as the Board may in each case approve, to act together as a committee of management of the said property, and such management shall be transferred to the committee accordingly.

(4.) Where trustees hold any property for the benefit of the inhabitants of, or for any public purpose (other than as herein before mentioned) connected with two or more parishes, the parish councils of the parishes concerned may, if the Board so decide, from time to time appoint, in such manner or rotation and subject to such conditions as may be prescribed in any order of the Board, such number of additional persons to act along with the trustees of the said property as may be approved by the Board in each case.

(5.) The term of office of a trustee appointed under this section shall be not longer than three years, but a trustee shall hold office until his successor is appointed, and shall be eligible for re-appointment.

(6.) The heritors of any parish may transfer the property of any churchyard which they hold to the parish council, and the

APPENDIX,
NO. IX.

parish council, if they accept such transfer, shall thereafter hold such churchyard for the same purposes and subject to the same rights for and subject to which it was held by such heritors, and shall have and may exercise and perform all the powers and duties before such transfer vested in or imposed on such heritors in relation to the churchyard transferred (except any power or duty of enlarging or extending such churchyard and assessing for the cost of such enlargement or extension): provided that the costs of maintenance and management of such churchyard after such transfer shall, if and so far as they require to be defrayed out of any rate, be a charge upon the poor rate: and provided also that such transfer shall not alter or transfer any liability to assess for the repayment of any debt or the incidence of any assessment levied for such repayment. After such transfer the powers and duties transferred shall no longer be exercised and performed by such heritors.

(7.) The Board may by order prescribe rules (1) as to the form in which the accounts of any property dealt with in this section shall be kept, and (2) as to the publication of the said accounts.

(8.) Whilst a person is trustee of any property or revenues falling within the provisions of this section, he shall not, nor shall his wife or any of his children, receive any benefit therefrom.

(9.) The provisions of this section with respect to the appointment of trustees shall not apply to any charity until the expiration of forty years from the date of the foundation thereof, or, in the case of a charity founded before the passing of this Act by a donor, or by several donors, any one of whom is living at the passing of this Act, until the expiration of forty years from the passing of this Act, unless with the consent of the surviving donor or donors.

No. X.

THE ECCLESIASTICAL ASSESSMENTS (SCOTLAND) ACT, 1900.

63 and 64 Vict. c. 20, An ACT to amend the Law regarding Ecclesiastical Assessments in Scotland. (30th July 1900.)

When assessment to be on valued rent.

I. Where in any parish it shall be necessary to impose an ecclesiastical assessment which, according to previous use and wont in the parish, would fall to be imposed according to the valued rent, but which it would be competent to impose according to the

real rent, it shall be lawful for any valued rent heritor to request the clerk to the heritors to summon a meeting of valued rent heritors in the manner prescribed by section twenty-two of the Ecclesiastical Buildings and Glebes (Scotland) Act; and if at such meeting it is resolved by a majority of not less than two-thirds in value of valued rent heritors, voting personally or by proxy, that the amount shall be imposed according to the valued rent, then such assessment shall be imposed according to the valued rent, any law to the contrary notwithstanding.

II. When it has been resolved to levy an assessment in any parish according to the real rent, intimation of such resolution shall be made to the presbytery of the bounds and to the kirk-session of such parish, and thereafter a scheme showing the heritors proposed to be assessed and the amount of their respective assessments shall be made up, and shall be open, free of charge, to inspection by any heritor or other party interested for a period of at least thirty days at some convenient place in the parish, and intimation of the place where, and the period for which the scheme is to be open to inspection, and the amount proposed to be levied on the heritor to whom it is sent shall be made by circular-letter sent by their clerk to all the heritors prior to the commencement of such period.

III. From and after the commencement of this Act, whenever any ecclesiastical assessment is imposed upon lands and heritages in any parish in Scotland according to the real rent thereof—

APPENDIX,
NO. X.

Inspection,
&c. of scheme
of assessment
on real rent.

Exemptions
from assess-
ment on real
rent.

- (1) No part of such assessment shall be imposed or levied upon lands and heritages occupied solely as the church and accessory buildings or burying-ground attached of any religious body in Scotland, or as the dwelling-house with offices, or garden or glebe land attached, of the minister of such church; and
- (2) The rental on which each heritor shall be assessed shall be his total rental within such parish as appearing in the valuation roll (whether such rental consists of one or more subjects), but subject to deduction of the sum of fifty pounds when the amount of the deficiency which would be created in the total amount of the assessment by allowing such deduction to every heritor has been paid to the collector of the assessment by the kirk-session:

Provided always that no heritor, who by reason of any exemption or deduction allowed by this section is relieved altogether from assessment in respect of the execution of any work, shall be

APPENDIX,
NO. X.

entitled at any meeting of heritors to take part in the discussion of, or to vote upon, any question concerning any plans for or the execution of the said work, or the defraying of the expenses of the same.

Definitions.

IV. In this Act, except where inconsistent with the context, expressions have the meaning attached to them in the Ecclesiastical Buildings and Glebes (Scotland) Act. The expression "ecclesiastical assessment" means an assessment for any of the purposes mentioned in section twenty-three of the said Act. The expression "valued rent heritor" means a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the valued rent. The expression "real rent heritor" means a heritor liable to contribute to ecclesiastical assessments where the same are imposed according to the real rent.

31 and 32 Vict.
c. 96.

V. This Act may be cited as the Ecclesiastical Assessments (Scotland) Act, 1900, and shall commence to have effect from and after the first day of January one thousand nine hundred and one.

hort title and
commencement
of Act.

No XI.

GENERAL ASSEMBLY'S REGULATIONS FOR APPOINTMENT OF MINISTERS.

Regulations framed and enacted by the General Assembly of the Church of Scotland to be observed in the Election and Appointment of Ministers (1893), with alterations (1894) (1895) and (1899).

Upon vacancy
occurring,
moderator of
kirk-session to
be appointed.

I. Upon a vacancy occurring in any parish, a meeting of the Presbytery shall be held as soon as possible, and within seven days of the vacancy coming to the knowledge of the moderator or clerk. At this meeting, which may be the meeting at which a vacancy has been created by an Act of the Presbytery or has come to the knowledge of the Presbytery, the Presbytery shall appoint a minister to declare the vacancy, and shall furnish him with the declaration, which may be in the form of Schedule A. 1. They shall also appoint one of their own number to be moderator of the kirk-session; provided that in collegiate charges, and in cases for the appointment of an assistant and successor, such appointment of a moderator shall be for the purposes of these regulations only, and shall not be made if the minister of the parish intimates that he desires to perform the duties; provided also that, if more than

one minister of the parish makes such intimation, the Presbytery shall appoint one of them.

APPENDIX,
NO. XI.

II. When any intimation provided for in these Regulations is to be read from the pulpit, the session-clerk shall cause a copy to be affixed before service to the door or notice-board of the church ; and the form of adherent's claim in Schedule B. shall be affixed along with the intimations in Schedule A. ; and the form of voting paper and directions to voters in Schedule G. shall be affixed along with the intimations in Schedules E. and F.

Publication of
intimations.

III. When a Presbytery has resolved that an assistant and successor shall be appointed in any parish, the date of such resolution by the Presbytery shall be held to be the date of the occurrence of the vacancy. The procedure thereafter shall, subject to the qualification in Regulation I., be the same as if a vacancy had occurred in the parish, provided that, in the event of the death of the minister before an election has been made, the date of the occurrence of the vacancy shall in that case be held to be the date of the death of the minister, and procedure shall begin *de novo*. But if the death of the minister occur after the election, but before induction, no new election shall be made.

Procedure in
case of appoint-
ment of assist-
ant and suc-
cessor.

IV. It shall be the duty of the kirk-session, as soon as possible after the appointment of a moderator, to proceed to make up an electoral roll of the congregation, which shall contain (1) as communicants all persons, not being under church discipline, whose names are upon the communion roll at the date of the occurrence of the vacancy after it has been corrected (if necessary) by the kirk-session as at that date ; as also those who are, and at that date were, parishioners in communion with the Church of Scotland and have given in certificates within the time intimated in terms of Schedule A. 2, provided such certificates are sustained ; (2) as adherents, such other persons, being parishioners or seat-holders at the date of the occurrence of the vacancy, and not under twenty-one years of age, as have claimed in writing within the time intimated as aforesaid, and in the form of Schedule B., to be placed on the electoral roll, and in regard to whom the kirk-session are satisfied that they desire to be permanently connected with the congregation, or are associated with it in its interests and work, and that no reason exists for refusing to admit them to the communion if they should apply. As regards adherents, the decision of the kirk-session shall be final.

The kirk-ses-
sion to make
up the electoral
roll.

V. At the same time as the declaration of the vacancy as aforesaid is made from the pulpit, the moderator shall cause intimation

APPENDIX,
NO. XI.

Hearing of
claims and pre-
paring of
electoral roll.

to be made in terms of Schedule A. 2, filled up by the kirk-session of a meeting of the kirk-session to decide on the claims of persons to be placed on the electoral roll. The time allowed for giving in certificates as communicants, and claims as adherents, shall be not less than four nor more than eight free days; and such certificates and claims shall be sent to the session-clerk. At their meeting, which shall be held on the day following the latest day intimated for giving in certificates and claims as foresaid, the kirk-session shall hear parties having an interest; and shall forthwith, and within four days from the date of said meeting, prepare the list of the names and addresses of communicants and adherents which they propose as the electoral roll of the congregation, the names being arranged in alphabetical order.

Inspection and
final adjust-
ment of
electoral roll.

VI. The list of persons proposed as the electoral roll of the congregation having been prepared, the moderator shall cause intimation to be made from the pulpit at the first ordinary diet of public worship thereafter, in terms of Schedule C. 1, that on that day, an opportunity will be given of inspecting the list in the session-house, or in the church after divine service, and that it will lie for inspection on the three days immediately following, at such place and for such hours as the kirk-session shall fix, due regard being had by them to the convenience of the congregation; and further, that on the following Thursday the kirk-session will meet to hear parties having an interest, and will finally revise and adjust said list. At this meeting, or at any adjourned meeting to be held within two days thereafter, the list, having been revised and adjusted, shall be attested by the moderator and clerk as the electoral roll of the congregation, and a certified copy shall be forthwith transmitted to the clerk of presbytery. The congregation for the purposes of these Regulations shall be the persons whose names are on the electoral roll attested as aforesaid; and no person shall be entitled to vote under these Regulations whose name is not on said electoral roll. On the electoral roll attested as aforesaid, and on the copy thereof to be transmitted to the clerk of presbytery, the names shall be numbered, and marked with their numbers, consecutively in the order in which they stand on the electoral roll. If, after the electoral roll has been attested, any communicant receives a certificate of transference, which certificate during a vacancy shall only be granted on a written application, the session-clerk shall give intimation of such transference to the moderator, who shall thereupon delete the name from the electoral roll, and initial the deletion.

VII. At the same time as the intimation in Schedule C. 1 is made from the pulpit, the moderator shall cause intimation to be made, in terms of Schedule C. 2, that a meeting of the congregation will be held to appoint a committee of their own number for the purpose of nominating one or more persons to the congregation with a view to the election and appointment of a minister. The day fixed by the kirk-session for the meeting of the congregation for the election of a committee shall be not earlier than the eighth nor later than the twelfth day after the day of intimation. Before proceeding to the appointment of this committee or of a new committee, as hereinafter provided, a resolution shall be passed by the meeting that the number of members constituting the committee shall not exceed a certain number specified in the resolution. The moderator shall preside at the meeting, and the electoral roll, attested as aforesaid, shall be in his hands, and he shall see that only qualified electors take part in the voting. At the close of the meeting the committee shall meet, and shall appoint one of their number to be convener, and another to be vice-convener, who shall act in the event of the convener's inability.

APPENDIX,
NO. XI.
Election of
congregational
committee.

VIII. The committee shall keep minutes of their proceedings, and at all meetings the convener shall have a deliberative as well as a casting vote. When they resolve to proceed to nominate with a view to the election and appointment of a minister to the vacant church and parish they shall carry out their nomination in manner following: They may name and propose one person for election and appointment by the congregation; or, in the event of being unable to resolve on a single nominee, they may name and propose more persons than one with a view to an election and appointment by the congregation; but in any case no nomination shall be made without the express consent of the person or persons to be nominated. No nomination shall be made except at a meeting when all the members are present, or at a meeting specially called by the convener by circular, at least five free days before the day of meeting, bearing that it is for this purpose; and in either case a majority of votes of those present shall determine the person or persons to be nominated. The minute of nomination shall be in the form of Schedule D., and shall be signed by the convener in the presence of the meeting. The convener shall, at the same time sign, in the presence of the meeting, a completed election notice, in the form of Schedule E., if only one person is nominated or in the form of Schedule F. 1, if more persons than one are nominated; and the minute and election notice thus signed shall be forthwith handed by him to the moderator.

Nomination by
the congrega-
tional com-
mittee.

APPENDIX,
NO. XI.Intimation of
nomination
and of election
arrangements.

IX. It shall be the duty of the moderator, upon receiving from the convener of the committee the minute of nomination and the election notice, to see that they are read from the pulpit by the officiating minister at the first ordinary diet of public worship after their receipt.

The day fixed by the committee for the election shall be not earlier than the eighth nor later than the twelfth day after the day on which the pulpit intimation of it is given; and in appointing the place of voting, and the time on the day of election (which shall not be the Lord's Day) during which the vote is to be taken, the committee shall have regard to the convenience of the electors, the number who may be expected to vote, and the proper carrying out of the election arrangements; and the time allowed for voting shall include a certain time during the day as well as in the evening. When a second or further vote has to be taken, the election notice shall be in the form of Schedule F. 2.; and as soon as the occasion for it arises, the convener of the committee shall insert in it the date on which the vote shall be taken, and otherwise complete it, and shall thereafter sign and hand it to the moderator, who shall see that it is read from the pulpit at the first ordinary diet of public worship after he receives it. Any second or further vote shall be taken not earlier than the Thursday following the Lord's Day on which the pulpit intimation of it is made, nor later than the Tuesday of the succeeding week. When the parish is so situated that, owing to great distance or otherwise, the electors of any part would be practically deprived of the opportunity of voting, if the voting were to be at one place only, the committee may arrange for the voting to be on two successive days, instead of on one day, and at a different place each day.

Procedure at
the election.

X. 1. The moderator of kirk-session shall preside at the election, and may be assisted by such persons as he shall appoint. The election shall be by voting papers in one of the forms prescribed in Schedule G., which with their counterfoils shall be numbered consecutively, and which, as well as all means necessary to carry out the voting, shall be provided by the Committee. The moderator shall have the electoral roll at the place of voting, and he shall see that a voting paper is not supplied to any person whose name is not on the electoral roll; and also that, as each elector receives a voting paper, the name of that elector is marked on the electoral roll as having voted, and his number on the electoral roll marked on the counterfoil of the voting paper supplied to him. He shall also arrange that the admission of electors shall be pro-

perly regulated, and that they retire after voting. Each elector, after receiving a voting paper, shall mark it as directed on the paper, and shall then place it in a ballot-box. The moderator, or his deputy or the member or members of the Presbytery presiding along with him (if any) appointed under Regulation XV., shall give assistance if desired by any elector in marking the voting paper, but no other person shall give such assistance; and care shall be taken that there is no interference with voters in marking their papers, and that they have an opportunity of marking them without divulging the vote given: provided always that the fact of a voting paper containing the means of identification shall not invalidate the vote, if it is otherwise sufficiently marked. The ballot-box and papers shall be under the charge of the moderator, who shall be responsible for their safe keeping.

2. When only one person is voted on, if the number of qualified electors voting "For" such person exceeds that of those voting "Against" him, he shall be held as elected and appointed; otherwise it shall be held that no election has been made.

3. When more persons than one are voted on, an elector may vote for any one of such persons, or he may vote against them all. If one of the persons voted on receives a majority of the whole votes recorded, he shall be held as elected and appointed. If no one of the persons voted on receives a majority of the whole votes recorded, there shall be struck off the name of the person (or, in case of equality, persons) receiving the lowest number of votes, or (as the case may be) the names of all those persons whose total number of votes taken together does not amount to the number of votes recorded for the person standing next higher in said voting, and a second vote shall be taken on the person or persons remaining; and the same course shall, if necessary, be followed by successive votings until only one person remains. If such remaining person has not received a majority of the whole votes recorded at the last voting, the procedure with respect to him shall be the same as if he had been the only person originally nominated; and if at the final vote he does not receive a majority of the whole votes recorded, or if at any voting all the persons voted on have equal votes, or there is a majority of the whole votes recorded against all the persons voted on, it shall be held that no election has been made.

XI. When a person nominated intimates his withdrawal before the election notice is read from the pulpit, the fact of his withdrawal shall be announced when the said notice is read, and the

Withdrawal of
nominations.

APPENDIX,
NO. XI.

wording of the notice may, if necessary, be altered so as to suit the altered circumstances. When a withdrawal is intimated after the election notice has been read from the pulpit, and before the voting commences, a notice of it, signed by the moderator of kirk-session or his deputy, shall be affixed to the door of the voting place, and, unless the person withdrawing is the sole original or remaining nominee, the voting shall proceed as if he had not been nominated, his name being struck out of the voting papers. In the event of the sole original or remaining nominee, or of all the original or remaining nominees, withdrawing, the convener of the committee, on being informed of the fact, shall forthwith call a meeting of the committee, to be held not less than three days after the date of calling the meeting, and the committee at this meeting, even though all the members are not present, may make a new nomination, or resolve to take steps thereto, or to take no such steps. If they resolve to take no further steps, the convener shall without delay inform the moderator of kirk-session in writing of the resolution come to, and the moderator shall proceed as directed by Regulation XIV. in the case of a failure to nominate; but if a new nomination is made or resolved on, the procedure prescribed in Regulations VIII. and IX. in regard to the making of the nomination and the intimation thereof and of the day of election shall be followed.

Counting and
declaration of
the votes and
call.

XII. As soon as practicable, and at latest within twenty-four hours, after the close of the voting the moderator shall proceed, in presence of the kirk-session, with the counting of the votes, in which he may be assisted as provided in Regulation X. He shall not count any papers in which, according to his judgment, the marking is uncertain. He shall, after the counting has been completed, make a declaration of the votes in one of the forms of Schedule H., said declaration to be forthwith affixed to the door or notice-board of the church. He shall also, after the counting is completed, seal up the voting papers used in the voting, and the counterfoils, to be handed to the Presbytery clerk if called for by the Presbytery, and after the settlement they shall be destroyed.

The moderator shall cause intimation to be given from the pulpit, as soon as possible after an election and appointment has been made, that a call in the usual form will lie with the session-clerk, or other suitable person, for a certain time, being not less than seven free days, to receive the signatures of the congregation and of parishioners.

XIII. After an election and appointment has been made, the

moderator of kirk-session shall without delay transmit the relative documents to the moderator or clerk of the Presbytery of the bounds to be laid before the Presbytery. The documents to be so transmitted shall be : Minute of nomination by the congregational committee ; all subsequent intimations to the congregation ; and the declaration of the election and appointment given under the hand of the moderator of kirk-session.

APPENDIX,
NO. XI.
Transmission
of documents
to Presbytery.

The moderator of kirk-session shall also at the same time inform the Presbytery of the steps taken with reference to the call, and of the time during which it is to lie with the session-clerk or other person ; and the session-clerk at the expiry of that time shall transmit it to the moderator or clerk of Presbytery.

XIV. If no minute of nomination from the convener of the congregational committee has been transmitted to the moderator of kirk-session within two months from the date of the election of the committee, five qualified electors of the vacant parish in cases where there are fewer than a hundred names on the electoral roll, and ten qualified electors when the names on the said roll amount to or exceed that number, may require the moderator to take steps with a view to a nomination being made. The moderator shall, upon receiving such requisition, intimate in writing to the convener of the committee that, in the event of no minute of nomination being lodged with him within ten days from the date of writing, the committee will be regarded as failing to nominate. If the committee so fail to nominate, the moderator shall cause intimation to be made as soon as possible from the pulpit of the vacant church in terms of Schedule I. that the congregation are to proceed of new to elect a committee ; and the procedure which is hereinbefore prescribed for the election of a committee shall be followed, provided always that the date of the election shall be fixed by the moderator and may be fixed by him for a day not earlier than the fourth day after the day of intimation. The same course (except that the pulpit intimation shall be in terms of Schedule J.) shall be followed where, though there has been a nomination, there has been a failure to elect a minister, followed by a resolution of the committee to make no new nomination. In any other case of failure to elect, or in the case of the person elected intimating in writing to the convener of the committee that he declines to accept, the committee, unless they resign and intimate their resignation to the moderator of the kirk-session, and the convener of the committee, shall be held as continuing in office, and shall forthwith take steps with a view to making a new

Failure to
nominate, and
failure to elect.

APPENDIX,
NO. XI.

nomination ; provided always that if, after any failure to elect, or the declination of the person elected to accept, a requisition, signed by not fewer than one-tenth of the qualified electors, be lodged with the moderator before the expiry of the third free day, requiring him to call a meeting of the congregation to determine whether the committee shall continue, or to elect a new committee, he shall at the first ordinary diet of public worship after receipt of such requisition, cause intimation to be made from the pulpit to that effect in terms of Schedule K., and the meeting may be fixed by him for a day not earlier than the fourth day from the day of intimation.

Power of
moderator of
kirk-session to
appoint deputy
and assistants.

XV. The moderator of kirk-session may, in case of unavoidable absence, authorise in writing a member of the Presbytery to act as his deputy, and he shall specify the occasion on which he is to act. Also, where he deems the number of persons voting, in the election of a minister, to be so large as to render it necessary that more than one person should preside, he may appoint in writing a member or members of Presbytery to preside along with him at the voting.

Interpre-
tation.

XVI. "Free days" shall be held to mean complete days exclusive of those on which the procedure in question begins or ends. The Lord's Day being reckoned as other days are.

SCHEDULES.¹

A.—*Intimations to be made on Occurrence of Vacancy* (Regs. I., II., III., IV., V.).

1. It is hereby declared, by order of the Presbytery of _____, that this church and parish (or the _____ charge of this parish, as the case may be) became vacant on _____ by _____.

Or, Intimation is hereby given that the Presbytery of _____, on _____, resolved that an assistant and successor shall be appointed in this parish ; and it is hereby declared that steps accordingly fall to be taken as if an ordinary vacancy had occurred at that date.

[When the charge is on the Assembly's list of Gaelic-speaking charges. Further, it is hereby declared that this being a charge on

¹ Printed copies of the series of Schedules for use at elections may be obtained (on payment of a small charge to cover the expense of printing) on application to Messrs. Wm. Blackwood & Sons, 45 George Street, Edinburgh.

the Assembly's list of Gaelic-speaking charges, only a Gaelic-speaking person is eligible to be minister of this charge.]

2. Intimation is hereby given, that the kirk-session are about to make up an electoral roll of this congregation, and that all parishioners not on the communion roll, who were parishioners at the occurrence of the vacancy, and who claim to be put on the electoral roll as communicants, shall give in certificates as communicants, and that all parishioners or seat-holders who claim to be put on the electoral roll as adherents shall give in written claims as adherents, not later than _____; and intimation is further given that the kirk-session will meet in the church (or session-house) on _____, when they will hear any party having an interest, and decide on said claims. Information as to the form of claim for adherents will be obtained from _____.

B.—Form of Adherent's Claim (Reg. IV.).

I, [insert name and address] being 21 years of age, claim to have my name placed upon the electoral roll of the parish of _____ as an adherent.

[To be signed here.]

C.—Intimation of Inspection of Roll and Election of Committee (Regs. VI., VII.).

1. Intimation is hereby given, that the proposed electoral roll of the congregation has now been prepared, and that an opportunity of inspecting it will be given to-day in the session-house [or in the church] between the hours of _____, and that it will be open for inspection at _____ on Monday, Tuesday, and Wednesday of this week between the hours of _____ each day; and further, that the kirk-session will meet in the session-house [or in the church] on Thursday next at _____ o'clock, when they will hear any party having an interest, and revise and finally make up the electoral roll.

2. Intimation is also hereby given, that a meeting of this Congregation will be held in the church on the _____ day of _____, at _____ o'clock, for the purpose of appointing a committee to nominate one or more persons to the congregation, with a view to the election and appointment of a minister.

D.—Minute of Nomination by Congregational Committee (Reg. VIII.).

The committee chosen by this congregation to nominate one or

APPENDIX,
SCHEDULES.

more persons, with a view to the election and appointment by the congregation of a minister to the vacant church and parish of _____, at a meeting held at _____ on _____, resolved [*say as to each name whether unanimously or by a majority*] to name and propose [*give name and designation, or names and designations*], and they accordingly do hereby name and propose the said

Date..... Convener of Committee.

E.—*Election Notice when one person is nominated* (Reg. VIII.).

Intimation is hereby given, that the committee chosen by this congregation having, as by minute now read, named and proposed Mr. _____ with a view to the election and appointment of a minister by the congregation to the vacant church and parish of _____, a vote of the congregation will be taken to determine whether or not he shall be elected and appointed. The vote will be taken by voting papers on _____ at _____ between the hours of _____ during the day, and between the hours of _____ in the evening, and the electors shall vote “For” or “Against” electing and appointing the said Mr. _____.

F.—*Election Notices when more persons than one are nominated* (Regs VIII., IX.).

1. Intimation is hereby given, that the committee chosen by this congregation having, as by minute now read, named and proposed [*here give the names*] with a view to the election and appointment of a minister to the vacant church and parish of _____, a vote of the congregation will be taken by voting papers on _____ at _____ between the hours of _____ during the day, and between the hours of _____ in the evening.

2. *When a second or further vote is to be taken.*—A vote of the congregation having been taken, and no one person nominated having received a majority of all the votes recorded, it is hereby intimated that another vote of the congregation falls to be taken. [*Here name the persons between whom the vote will be, or the person on whom the vote will be “For” or “Against.”*] The vote will be taken by voting papers on _____ at _____, between the hours of _____ during the day, and between the hours of _____ in the evening.

G.—*Voting Paper.*¹APPENDIX,
SCHEDULES.*First Form.*—When one person is to be voted on.

Counterfoil.	No.....	No.....	
		FOR electing Mr. A—— B——	
		AGAINST " "	

Directions to Voters, to be printed on the voting paper.—If you are in favour of electing Mr. A—— B——, put a cross opposite his name. If you are against, put a cross opposite "Against." If you put a cross in more than one of the spaces, the paper will not be counted.

Second Form.—When more persons than one are to be voted on.

Counterfoil.	No.....	No.....	
		Mr. A—— B——	
		Mr. C—— D——	
		AGAINST BOTH the above-named,	

When there are more than two nominees, insert "all" instead of "both," and make the same change in the directions to voters.

Directions to Voters, to be printed on the Voting Paper.—If you are in favour of electing one of the persons named, put a cross opposite his name. If you object to both of the persons, put a cross opposite the words "Against both the above-named." If you put a cross in more than one of the spaces, the paper will not be counted.

¹ The voting papers to be used in the election will have to be provided by the committee in terms of Regulation X.; but Messrs. Blackwood will supply (on payment of a small charge to cover the expense of printing), on application, copies of the voting paper, and instructions to voters, suitable for being affixed to the door or notice-board of the church, as required by Regulation II. It will be necessary, in applying, to inform Messrs. Blackwood whether one person, or two, or more than two are to be voted on.

APPENDIX,
SCHEDULES.

H.—*Forms of Declaration of Votes in the Election of a Minister.*

1. *When an election has been made* (Reg. IX., X.)—I hereby declare that the following are the results of the voting for the election and appointment of a minister to the vacant church and parish of [here give the name of nominee, or names of nominees, and the state of the vote], and that the said Mr. has accordingly been elected and appointed, subject to the judgment of the Courts of the Church.

..... *Moderator of Kirk-Session.*

Date.....

2. *When an election has not been completed* (Reg. X.)—I hereby declare that the following are the results of the voting for the election and appointment of a minister to the vacant church and parish of [here give the names of the nominees and the state of the vote], and that no one person having received a majority of all the votes recorded, the election has not been completed. *Moderator of Kirk-Session.*

Date.....

3. *When the Voting has resulted in Failure to Elect* (Reg. X., XIV.)—I hereby declare that the following are the results of the voting, &c. [here give the name of nominee, or names of nominees, and the state of the vote], and that, in consequence of [here state the reason] there has been a failure to elect.

..... *Moderator of Kirk-Session.*

Date.....

I.—*Intimation in case of Failure to Nominate* (Reg. XIV.).

Intimation is hereby given, that a committee having been formerly appointed by this congregation to nominate one or more persons to the congregation with a view to the election and appointment of a minister, and said committee having failed to nominate, a meeting of this congregation will be held in the church on the day of , at o'clock, when they will proceed of new to elect a committee.

J.—*Intimation in case of Failure to Elect followed by the Committee's Declinature to nominate anew, or their Resignation* (Reg. XIV.).

Intimation is hereby given, that a committee having been

formerly appointed by this congregation to nominate one or more persons to the congregation with a view to the election and appointment of a minister, and said committee having declined to nominate anew [*or having resigned*], a meeting of this congregation will be held in the church on the day of , at o'clock, when they will proceed of new to elect a committee.

K.—*Intimation on Requisition to the Moderator* (Reg. XIV.).

Intimation is hereby given that a requisition to that effect by the required number of qualified electors having been made to the moderator, a meeting of this congregation will be held in the church on the day of at o'clock, to determine whether or not the present Committee shall be continued in office, and to continue them or to appoint a new committee, as may be resolved.

LIST OF CASES.

(Where the name of the parish is not indicated by the name of the case the name of the parish is printed in *Italics*. A List of Parishes will be found at the end of the List of Cases with references to the cases by number.)

	PAGE
1. A. B., Mor. 7938	233
2. A. B., Petitioner, 2 S. 526 (n.e.) 461	349
3. A. B. v. Sloan, 3 S. 195 (n.e.) 133	349
4. Abbotshall Common Agent v. Martin (<i>A. and Kirkcaldy</i>), 22nd November 1815, F.C.	38, 344
5. Abdie Heritors v. Corsan, Mor. 2490	624
6. Abercorn, Duke of, v. Presbytery of Edinburgh, 7 M'P. 875, 8 M'P. 733 (<i>Duddingston</i>)	115, 158, 542, 547, 582
7. Aberdeen, Bishop of, v. Forbes, Mor. 7933	232
8. Aberdeen, Bishop of, v. late Bishop's Executors, Mor. 7934	232
9. Aberdeen College, Mor. 14,789	277
10. Aberdeen College v. Aboyne, Mor. 14,791 (<i>Coull</i>)	301
11. Aberdeen College v. Menzies, Mor. 7945	234
12. Aberdeen College v. Heritors of Rathen, Mor. 15,897	302
13. Aberdour Heritors v. Roddick, 10 M'P. 221	415
14. Aberscherder Minister v. Gamrie Minister, Mor. 10,972	270
15. Adamson v. M'Leroy, 14 D. 248 (<i>Glasgow City and Barony</i>)	252
16. Adamson v. Paston, 14th February 1816, F.C. (<i>Cupar</i>) 369, 370, 426, 427, 463	81, 82
17. Advocate, H.M., v. Graham, 7 D. 183 (<i>Eccles</i>)	81, 82
18. Advocate, H.M., v. Earl of Mansfield, 8 S. 765 (<i>Scone, Redgorton,</i> <i>Kinfauns</i>)	83
19. Advocate, H.M., v. Paterson, J. Shaw (Just.) 1	69
20. Advocate, H.M., v. Magistrates of Stirling, 8 D. 450	83
21. Aitken v. Thomson, 5 S.C.R. 300 (<i>Slamannan</i>)	547
22. Aitken v. Waddell, 5 S.C.R. 262 (<i>Slamannan</i>)	547
23. Alexander v. Cunningham, Mor. 470	305
24. Alexander v. Oswald, 3 D. 40 (<i>Kirkcaldy</i>)	340, 341
25. Alexander v. Pinkerton, 5 S. 185 (<i>Kilbride, Ardrossan</i>)	66, 569
26. Allan v. King's College, Aberdeen, 23rd January 1811, F.C. (<i>Newhills</i>)	328
27. Anderson, Mor. 5152	374, 375
28. Anderson v. Kirkwall Kirk-Session, Mor. 8017, 13,137, and 5 Br. Supp. 600	610, 611, 614, 615
29. Anderson v. His Parishioners, Mor. 5121 (<i>Dysart</i>)	425, 426
30. Anderson v. Thomas, 22nd May 1810, F.C., affd. 2 Dow, 433 (<i>Abdie</i>)	374, 496, 501, 503

	PAGE
31. <i>Anderson v. Union Canal Co.</i> , 1 D. 648 (<i>St. Cuthbert's, Edinburgh</i>)	513
32. <i>Anderson v. Urquhart</i> , Mor. 14,836 (<i>Stronsay and Eday</i>)	293, 347
33. <i>Andrew v. Magistrates of Linlithgow</i> , Mor. 1883	8
34. <i>Annandale v. Rodger</i> , 1 Br. Supp. 306 (<i>St. Mungo's</i>)	266
35. <i>Anstruther v. Anstruther</i> , 2 S. 306 (<i>Elie, Kilconquhar, Kilrenny</i>)	112, 511
36. <i>Anstruther v. Carstairs</i> , unreported, 1807 (<i>Carnbee</i>)	458, 479
37. <i>Arbirlot Stipend</i> , 1 Connell, Tithes, 396	288
38. <i>Arbroath Heritors v. Minister</i> , 10 R. 767; sequel 20 S.L.R. 781 15, 367, 424, 425, 426, 438, 449, 516, 588	
39. <i>Arbroath Minister v. Magistrates</i> , Mor. 8502	261, 262, 264
40. <i>Arbuthnot v. Calderwood</i> , 19th January 1821, F.C. (<i>Arbuthnot</i>)	83
41. <i>Ardrossan Minister v. Heritors</i> , unreported, 1902	117, 586
42. <i>Argyle, Duke of, v. Rowat</i> , Mor. 7921 (<i>Cambelton</i>)	151, 157, 514, 538
43. <i>Auchintuill v. Innes</i> , Mor. 16,603	452
44. <i>Auchterarder Heritors v. Presbytery</i> , 40 S.L.R. 45	585, 586, 588
45. <i>Auchtergaven Parish Council v. Kirk-Session</i> , 11 Poor Law Mag. (n.s.) 546	603
46. <i>Auchterhouse Minister v. Hay</i> , 1 B.S. 617	346
47. <i>Auld v. Ayr Magistrates</i> , 6 S. 1087 (<i>Ayr, Alloway</i>)	10, 13, 14, 466
48. <i>Ayr Magistrates v. Auld</i> , 4 S. 99 (n.e.) 101, rev. 2 W. & S. 607 (<i>Ayr, Alloway</i>)	14, 363, 369, 464, 502
49. <i>Baikie v. Logie</i> , 5 S. 546 and 6 S. 748 (<i>Kirkwall</i>)	369, 411, 412, 544
50. <i>Baillie v. His Tenants</i> , Mor. 15,722	274
51. <i>Baillie v. Morrison</i> , 1 S. 363 (<i>Kiltarlity</i>)	82, 98
52. <i>Baillie v. Sorn Parochial Board</i> , 27 S.L.R. 6 (<i>Catrine</i>)	252, 629
53. <i>Bain v. Grant</i> , 22 S.L.R. 132 (<i>Duthil, Rothiemurchus</i>)	628
54. <i>Bain v. Seafeld</i> , 12 R. 62, 14 R. 939 (<i>Duthil</i>) 203, 205, 208, 210, 225, 408, 571	
55. <i>Baird, Petitioner</i> , 20 R. 973 (<i>Kelvinhaugh and Barony, Glasgow</i>)	29, 44
56. <i>Baird v. Fyvie Parishioners</i> , Mor. 11,061	313
57. <i>Baird v. Minister of Polmont</i> , 10 S. 752	339
58. <i>Balfour v. Ker</i> , Mor. 14,784 (<i>Hettam</i>)	293
59. <i>Balfour v. Bishop of St. Andrews</i> , Mor. 8495 (<i>St. Andrews</i>)	356
60. <i>Balfour Heritors v. Niven</i> , 1 M'P. 324	375, 376, 402
61. <i>Banchory Parishioners v. Minister of Dirleton</i> , 124	490
62. <i>Banchory-Ternan Minister v. Heritors</i> , 20th June 1810, F.C. foot-note, p. 687	314
63. <i>Barclay v. College of St. Andrews</i> , Mor. 7957, 11,001 (<i>Forteviot</i>)	259
64. <i>Barry Minister</i> , mentioned 5 Br. Supp. 493	497
65. <i>Bass v. Young</i> , Mor. 8019	207
66. <i>Bassendean Union Case</i> , Connell Par. 19 (<i>B. and Gordon</i>)	28
67. <i>Beaton v. Dallas, Elchies, Glebe</i> , 1, Connell Par. 408	189, 207, 490
68. <i>Beith Stipend</i> , 13 S. mentioned pp. 797 and 798	327
69. <i>Bell v. Wemyss</i> , Mor. Kirk, App. 3 (<i>Inveresk</i>)	113
70. <i>Bellie Glebe</i> , Connell Par. 237	468
71. <i>Bellie Stipend</i> , 1 Connell, Tithes, 398	288
72. <i>Belshes v. Moore</i> , 4 S. 347; rev. 2 W. & S. 558 (<i>Oldhamstocks</i>) 475, 490, 493, 495	
73. <i>Bertram v. Lanark Presbytery</i> , 2 M'P. 1406 (<i>Carnwath</i>)	119, 123, 141

LIST OF CASES.

695

	PAGE
74. Bethune v. Small, Connell Par. 409 (<i>Kilconquhar</i>)	490
75. Beveridge v. Bayne, Mor. 8014 (<i>Dunfermline</i>)	609, 616, 631
76. Bird v. Justice, 4 Br. Supp. 77 (<i>Orichton</i>)	157
77. Birnie v. Brown, Mor. 2489, 11,000 (<i>Carlaverock</i>)	262, 265, 273, 624
78. Birnie v. Lockhart, 1 Br. Supp. 741 (<i>Carstairs</i>)	303, 304
79. Birnie v. Earl of Nithsdale. <i>See</i> Birnie v. Brown.	
80. Black v. Orwell Kirk-Session, unreported	215
81. Blair v. Fowler, Mor. 10,168 (<i>Kinfauns</i>)	372
82. Blair v. Skeen, Mor. 15,899 (<i>Auchtertool</i>)	301
83. Blairgowrie Heritors v. Officers of State, Mor. 1577	340
84. Blantyre, Lord, v. Currie, Rob. App. 88 (<i>Haddington, Gladsmuir</i>)	294
85. Bonar v. Lyon, Mor. 9099, 16,606	452
86. Bo'ness Parish Council v. Kirk-Session, 2 F. 661	595, 603
87. Bontine v. Carrick, 5 S. 811	476
88. Borthwick Minister v. Dundas, 3 R. 361	322
89. Boswell v. Hamilton, 15 S. 1148 (<i>Mauchline</i>)	111, 538
90. Boswell v. Magistrates of Kirkcaldy, Mor. 10,890	339
91. Boswell v. Duke of Portland, 13 S. 148 (<i>Mauchline</i>)	104, 106, 129, 519, 531, 532, 533, 548, 572
92. Botriphnie Manse, Connell Par. 293 and 309	376, 384, 388
93. Bowar v. Grahame, 2 Br. Supp. 435 (<i>Inverarity</i>)	357
94. Bowton Vicar v. Cockburn, Mor. 7935	233
95. Boyd, Petitioner, 19 S.L.R. 828	628
96. Boyd v. Earl of Galloway, Mor. 9583 (<i>Penninghame</i>)	317
97. Brennan v. Officers of State, 9 S. 838 (<i>Walls and Flotta</i>)	242, 471
98. Brewster v. Marquis of Abercorn, 15 S. 991 (<i>Paisley</i>)	324
99. Broughton Union Case, Connell Par. 200 (<i>Broughton, Kilbucko, Glenholm, Culter</i>)	32, 36
100. Brown v. Hunter, Mor. 15,730 (<i>Crailling</i>)	274
101. Brown v. Johnston, 8 S. 899 (<i>Rutherglen</i>)	526, 527
102. Browne, Petitioner, 2 R. 488 (<i>Beith</i>)	483
103. Bruce v. Bruce, 11 M'P. 755 (<i>Nesting</i>)	541
104. Bruce v. Carstairs, 4 S. 626 (<i>Anstruther Wester</i>)	10, 448, 495, 499
105. Bruce Carstairs v. Greig, Mor. 2333, affd. 3 Pat. 675 (<i>Kinross</i>)	113, 373
106. Brydekirk Minister v. Hoddam Heritors, 4 R. 798	487
107. Buccleuch, Duke of, v. Hassendean Parishioners, Mor. 10,999, 12,401	258
108. Buccleuch, Duke of, v. Scott, 2 Br. Supp. 497 (<i>Hassendean</i>)	451
109. Buchanan v. Gilmour, 11 R. 59 (<i>Eaglesham</i>)	328
110. Buchanan's Trustees, 14 R. 284, 22 R. 602 (<i>Kilmarnock, Riccarton, Hurlford</i>)	630
111. Buchanan v. Magistrates of Dunbar, 4 M'P. 1023, 7 M'P. 576	277, 619, 625, 626
112. Buist v. Cheape, S. (Teinds) 23 (<i>St. Andrews</i>)	292
113. Buist v. Taylor, 18 D. 596 (<i>Ferry-Port-on-Craig</i>)	551, 552
114. Buittle Case. <i>See</i> note to Old Deer Case, 23rd November 1808, F.C.	327
115. Burnet v. Gibb, Mor. 15,640, 15,717, 15,725, 1 Br. Supp. 752	274
116. Burns v. Ewing, 15 S. 936; <i>rev.</i> M'L. & R. 435 (<i>Glasgow Barony and City</i>)	40

	PAGE
117. Bute, Marquis of, <i>v.</i> Rothesay Magistrates, 2 M'P. 1278 (<i>North Bute</i>)	27, 28, 40, 46, 52
118. Cadder Heritors <i>v.</i> College of Glasgow, Connell Par. 78	26, 46, 48
119. Cæsar <i>v.</i> Magistrates of Dundee, 20 D. 859 (<i>Dundee Cross Church</i>)	298, 316
120. Cairney Heritors <i>v.</i> Presbytery of Strathbogie, Mor. 8514	387, 391, 409
121. Cairney Stipend Case, Connell, Tithes, vol. i. p. 418 (<i>Cairney Botary</i>)	326
122. Cameron <i>v.</i> Chisholm Batten, 7 M'P. 565 (<i>Kilmorack</i>)	338
123. Campbell and Others, Petitioners, 19th May 1815, F.C. (<i>Dunoon</i>)	116, 129, 131, 572, 580, 583, 591
124. Campbell <i>v.</i> Campbell, 15 D. 5 (<i>Kilcalmonell, Kilberry</i>)	6, 16, 66, 67, 68, 69, 71, 249
125. Campbell <i>v.</i> Gillanders, 12 R. 309 (<i>Lochs</i>)	252
126. Campbell <i>v.</i> Jack, 8 S. 196, 9 S. 167 (<i>Bothwell</i>)	128, 131
127. Campbell <i>v.</i> Presbytery of Kintyre, 5 D. 657 (<i>Southend</i>)	555
128. Campbell <i>v.</i> Morgan, 12 D. 1262 (<i>Lerwick</i>)	443, 449, 453, 454, 566, 567
129. Campbell <i>v.</i> Morison, 11 M'P. 80 (<i>Balmerino</i>)	482, 484
130. Campbell <i>v.</i> Murray, Mor. 14,792 (<i>Kirkbean</i>)	294
131. Campbell <i>v.</i> M'Donald, Mor. 14,795	301
132. Campbell <i>v.</i> Officers of State, 3 M'P. 295 (<i>Glasgow, St. George's and Barony</i>)	45, 48, 49, 51
133. Campbell <i>v.</i> Stirling, 4th March 1813, F.C., 6 Paton, 238 (<i>Cadder</i>)	79, 523, 524, 525, 526, 528, 530
134. Carfrae <i>v.</i> Heritors of Dunbar, 13th May 1814, F.C.	380, 489, 502, 505
135. Cargill Heritors <i>v.</i> Tasker, 20th February 1816, F.C.	240, 251
136. Carmichael <i>v.</i> M'Lean, 15 S. 1020 (<i>Symington</i>)	394, 399, 401, 402, 403
137. Carmunnock Case, Connell Par. 220 (<i>C. and Cathcart</i>)	41
138. Carmyllie Aug., Elliot, T.C.P. 49 (<i>Carmyllie</i>)	346
139. Carnegie <i>v.</i> Spied, 11 D. 1250 (<i>Breckin</i>)	327, 371, 375, 406, 409
140. Carsphairn Minister <i>v.</i> Heritors, 20 R. 521	318
141. Carstairs Stipend. <i>See</i> Simpson, 7th June 1809, F.C.	346, 347
142. Cassie <i>v.</i> General Assembly, 6 R. 221 (<i>New Deer</i>)	87
143. Cathcart <i>v.</i> Paton, Mor. 10,524 (<i>Barnwell</i>)	292
144. Cathcart <i>v.</i> Weir, Mor. 7928 (<i>Greenock</i>)	158
145. Cawdor, Earl of, <i>v.</i> Ross, 39 Jurist, 533 (<i>Ardersier</i>)	629
146. Chalmer <i>v.</i> Lord Cathcart, Connell Par. Supp. 104, Bankt. 2, 8, 193 (<i>Coylton</i>)	214
147. Charters <i>v.</i> Currie Parishioners, Mor. 10,165	358, 377, 378
148. Cheyne <i>v.</i> Cook, 1 M'P. 963 (<i>Ladhope</i>)	311, 630
149. Cheyne <i>v.</i> Magistrates of Dundee, 4 M'P. 1002	312
150. Cheyne <i>v.</i> Manela Parishioners, Mor. 5136	405
151. Chirnside Presbytery <i>v.</i> Coldingham Heritors, 10 D. 10 (<i>Coldingham, Houndwood</i>)	50, 51
152. Chisholm Batten <i>v.</i> Cameron, 12 M'P. 292 (<i>Kilmorack</i>)	340
153. Chrystison <i>v.</i> Anderson, Mor. 7946 (<i>Auchtergaven</i>)	17
154. Clapperton <i>v.</i> Magistrates of Edinburgh, 2 D. 1385 (<i>Edinburgh, Tolbooth</i>)	151, 163, 165, 166, 167, 297, 298, 514
155. Clark <i>v.</i> Stirling, 1 D. 955 (<i>Lethendy</i>)	553
156. Clark <i>v.</i> Stirling, Second Case, 3 D. 722 (<i>Lethendy</i>)	93, 96, 307
157. Clephane <i>v.</i> M'Arthur, 1 S. 487	492

	PAGE
158. Cochran, Petitioner, Mor. 9909 (<i>Culross</i>)	98
159. Cochran v. Stoddart, Mor. 9951 (<i>Culross</i>)	81, 99, 300, 301
160. Cochrane v. Smith, 22 D. 252 (<i>Cupar</i>) 256, 257, 260, 261, 262, 263, 264, 266, 267, 445	
161. Cock v. Parishioners of Auchtergaven, Mor. 5150	445, 450, 451
162. Cockburnspath Minister v. Parishioners, 2 Br. Supp. 141	564
163. Colquhoun v. Fogo, 11 M'P. 919 (<i>Row</i>)	340
164. Colvill v. Balmerino, Mor. 464, 466 (<i>Kirknewton</i>)	305, 457
165. Couper v. Earl of Roxburgh, Mor. 12,411, 14,791 (<i>Lilliesleaf</i>) 293, 294, 301	
166. Couper v. Bruce, Mor. 13,831 (<i>Anstruther</i>)	247, 455, 456
167. Cowan v. Gordon, 6 M'P. 1018 (<i>Kelton</i>)	252
168. Craig v. Anderson, 20 R. 941 (<i>Old Deer</i>)	88
169. Craig v. Hillhead, Mor. 10,999 (<i>Hoddam</i>)	261, 262
170. Craigdallie v. Aikman, 1 Dow, 1; 5 Paton, 719; 6 Paton, 618; 2 Bligh, 529	147
171. Cramond Stipend, 1 Connell, Tithes, 340	287
172. Crawford v. Beatton, 1 Br. Supp. 688 (<i>Ayton</i>)	300
173. Crawford v. Crawford, 1 Br. Supp. 142	260
174. Crawford v. Maxwell, Mor. 10,819 (<i>Stoneykirk</i>)	463, 466
175. Crieff Feuars v. Heritors, Mor. 7924 105, 150, 152, 164, 536, 537, 543	
176. Crossraguel Abbot v. Hamilton, Mor. 7933	232
177. Cullen Case, Connell, Tithes, App. xxxii.	619
178. Cullen v. Sprott, 3 D. 70, 561 (<i>Cadder</i>)	79, 525
179. Culross Second Minister Case, Connell Par. 133	291
180. Cuninghame v. Presbytery of Irvine, 5 D. 427 (<i>Stewarton</i>) 6, 59, 554	
181. Cuninghame v. M'Ewan, 16 D. 511 (<i>Crieff</i>)	597, 631
182. Cunningham v. Edmiston, 9 R. 869	217, 218
183. Cunningham v. Deans, 12th December 1811, F.C. (<i>Stewarton</i>) 120, 121, 132, 397, 534, 572, 573, 575, 583	
184. Cunninghams v. Cunningham, 5 Br. Supp. 415 (<i>Currie</i>) 183, 187, 195, 197, 202, 205	
185. Dalgleish v. Heritors of Peebles, Mor. 15,714	336
186. Dalhousie's Tutors v. Minister of Lochlee, 17 R. 1060; affd. 18 R. (H.L.) 72	467, 471
187. Dalmeny Manse, Connell Par. 293	376
188. Dalrymple v. Callander, 5 S. 935 (<i>Cranston</i>)	468, 471
189. Dalrymple v. Gordon, Mor. 15,915	301
190. Dalton Stipend, 1 Connell, Tithes, 398	288
191. Daun v. Heritors of Inch, 6th June 1810, F.C.	314
192. Davidson v. Aikman, 27th June 1805, F.C.	147
193. Dawson v. Pringle, 15th June 1808, F.C., Mor. Annual Rent, App. 5 (<i>Stow</i>)	289, 293, 323, 329, 347
194. Deer Presbytery v. Heritors of Pitsligo, 3 R. 975	582
195. Dempster v. Headrick, Connell Par. 300 (<i>Dunnichen</i>)	398
196. Dick v. Carmichael, Mor. 9954, rev. Kinnear, Dig. 252 (<i>Lanark</i>)	99, 301
197. Dickson v. Heritors of Newlands, Mor. 7464	301
198. Dingwall v. Gardiner, 27th November 1816, F.C., affd. 3 Bligh, 72, and 1 Shaw, App. 10 (<i>New Aberdour</i>)	381, 394
199. Dingwall v. Gardiner, No. 2, 4 S. 246 (<i>New Aberdour</i>)	411, 413

	PAGE
200. Dipple and Essill, Connell Par. 156	34
201. Dobbie v. Halbert, 1 M.P. 532 (<i>Annan</i>)	160
202. Dobie v. Heritors of Linlithgow, Mor. Manse, App. 1, note, Connell Par. 265	368, 426
203. Dollar Minister v. Duke of Argyle, 2nd July 1807, F.C., Mor. Glebe, App. 7	245, 503
204. Donaldson v. Brown, Mor. 471 (<i>Dolphinton</i>)	305, 391
205. Douglas v. Haymouth Parishioners, 1 Br. Supp. 232 (<i>Haymouth</i> , <i>Coldingham</i>)	6, 17
206. Douglas v. Heritors of Manor, Mor. 8501	391
207. Douglas, Parson of, v. Tenants, Mor. 7963	232
208. Dow v. College of Glasgow, S. (Teinds) 77 (<i>Cathcart</i>)	315
209. Dow v. Imrie, 14 R. 928 (<i>Penicuik</i>)	305
210. Downie v. M'Lean,* 11 R. 47 (<i>Annan</i>)	150, 151, 157, 515, 544
211. Drumlanrig, Laird of, v. Laird of Conhill, Mor. 7941 (<i>Kilwinning</i>)	234
212. Drummond v. Heritors of Monzie, Mor. 7920 (<i>Monzie</i> , <i>Moneydie</i> , <i>Crieff</i>)	28, 41, 67, 114, 154, 546
213. Drummond v. Montgomerie, 5 D. 27 (<i>Glassford</i>)	347
214. Drymen Heritors v. Officers of State, Mor. 10,675, affd. 2 Paton, 15	339, 340
215. Duddingston Kirk-Session v. Halyburton, 10 S. 196	184, 214, 218
216. Duff v. Brodie, Mor. 9644 (<i>Elgin</i>)	161, 167
217. Duff v. Chalmers, Mor. 5147, 1 Hailes, 285 (<i>Aberfoyle</i>)	473, 474, 488
218. Dumfries Kirk-Session v. Kirk-Sessions of Kirkcudbright and Kelton, Mor. 10,580, 2 Hailes, 634	632
219. Dumfries Kirk-Session v. Squaremen, Mor. 8018	215
220. Dunbar Case, Connell, Tithes, App. xxxii.	619
221. Dunbar and Others, Petitioners, 29th June 1804, F.C., Mor. Jurisdiction, App. 11 (<i>Wick</i>)	116, 562, 580, 581
222. Dunbar v. Presbytery of Abernethy, 26 S.L.R. 517 (<i>Cromdale</i>)	87
223. Dunbar v. Gordon, Mor. 15,663 (<i>Duffus</i>)	294
224. Dunbar Magistrates v. Heritors, 11 S. 879; rev. 1 S. & M'L. 134	66, 67
225. Dunblane, Bishop of, v. Kinloch, Mor. 7950	259, 261
226. Duncan v. Parishioners of Kirkpatrick Easter, Mor. 5140	446
227. Dundas v. Nicolson, Mor. 8511, 2 Hailes, 802 (<i>Nesting</i>) 112, 155, 184, 397, 444, 512, 535, 536, 574	448, 490
228. Dundas v. Somerville, Mor. Glebe, App. 5 (<i>Jedburgh</i>)	612
229. Dundee Kirk-Session v. Magistrates, 5 Br. Supp. 599	310
230. Dundee Magistrates v. Nicol, 8 S. 66	557, 558
231. Dundee Magistrates v. Presbytery, 20 D. 849, affd. 4 Macq. 228	292
232. Dundee Masters v. Wedderburn, 8 S. 547	419, 441
233. Dunfermline, Lord, v. M'Gill, Mor. 5137 (<i>Dunfermline</i>)	497
234. Dunfermline Minister v. Black, Elchies, Glebe, 5	367, 407, 411, 426, 584
235. Dunfermline Minister v. Heritors, Mor. Manse, App. 1, affd. 5 Paton, 593	263
286. Dunipace Ministers v. Lady Dunipace, Mor. 11,004	342
237. Dunkeld Stipend Case, unreported	

* This case is cited erroneously on pages 150, 151, and 157, as Downie v. Magistrates of Annan, 6 R. 457.

	PAGE
238. Dunlop v. Commissioners of Woods, 20 D. 1012 (<i>Buncle</i>) . . .	284
239. Dunning Minister v. Heritors, Mor. Kirk, App. 4 . . .	116, 123, 126, 132, 577, 584
240. Duns Case, 1865, unreported	622
241. Dunsyre Case, 5 Br. Supp. 600	615
242. Durie v. Thomson, Mor. 5161 (<i>Dunfermline</i>)	493, 508
243. Durness Disjunction Case, Connell Par. 69 (<i>Durness, Tongue, Edrachilles</i>)	46
244. Dymock v. Duke of Montrose, Mor. 5149 (<i>Cairney</i>)	473, 474, 488
245. Dysart Parson v. Watson, Mor. 5139	440, 567
246. Easson v. Rawson, 5 D. 1430 (<i>Dundee Steeple Church</i>)	142, 144, 145, 148
247. Eastwood Case, Connell, Tithes, vol. i. p. 383	621
248. Eckford School Board v. Rutherford, 16 R. 377	415
249. Eddleston Locality, Mor. Teinds, App. No. 13	334, 335
250. Edinburgh, Bishop of, v. Brown, Mor. 2719	231
251. Edinburgh Ecclesiastical Commissioners v. St. Giles' Kirk-Session, 15 R. 952	168
252. Edinburgh Magistrates v. Learmonth, 18 D. 77 (<i>St. Cuthbert's, Edinburgh</i>)	321
253. Edinburgh Presbytery v. De la Condamine, 7 M'P. 213 (<i>St. John's, Leith</i>)	558
254. Edinburgh Presbytery v. Lady Glenorchy's Trustees, 18 Jur. 305	558
255. Edinburgh Presbytery v. Magistrates, 10 D. 247	558
256. Edmonston v. Graham, Mor. App. Teinds, No. 15 (<i>Strathblane</i>)	341
257. Ednam Minister's Relict v. Laird of Wedderburn, Mor. 8499	511
258. Edzell Manse Case, Connell Par. 293	376
259. Elder v. Fotheringham, 7 M'P. 341 (<i>Tealing</i>)	331
260. Elgin Heritors v. Troop, Mor. 8508	353, 367, 368, 370
261. Elgin Magistrates v. Gatherer, 4 D. 25	112, 243, 370, 381, 394, 407, 514, 544, 565
262. Elgin Magistrates v. Minister, Mor. 7916, 13,124	607, 610, 612
263. Elgin Ministers v. Parishioners, Mor. 15,724, and 1 Br. Supp. 569	265
264. Elgin Second Minister Case, Connell Par. 129	291
265. Elibank v. Hart, 15 R. 927 (<i>Aberlady</i>)	341
266. Elliott v. Hunter, 5 M'P. 1028 (<i>Kirkton</i>)	376, 390, 400
267. Elliot v. Minister of Abbotrule, Mor. Stipend, App. 1 (<i>Abbotrule, Hobkirk, Chesters</i>)	26
268. Elphinstone v. Lord Blantyre, Mor. 16,585	452, 509
269. Elphinstone, Mor. 15,723	265
270. Erskine v. Pitcairn, Mor. 7962	232
271. Eskdalemuir Minister v. Scott, Mor. 14,795	294
272. Ettrick Case, Connell, Tithes, vol. i. 119	619
273. Fairnie v. Dunfermline Heritors, Mor. 14,796, Elchies, Stipend, 6	291, 316
274. Falkirk Second Minister Case, Connell Par. 121	291
275. Falkirk Disjunction Case, Connell Par. 219 (<i>Falkirk, Slamanau, Cumbernauld, Denny</i>)	28
276. Falkland Heritors v. Minister, Mor. 7916	156
277. Falkland Minister v. Johnston, Mor. 5155	240, 244, 245, 270, 406, 463, 471, 480

	PAGE
278. Falkland Minister <i>v.</i> Strathmiglo Minister, Mor. 10,638 . . .	256
279. Farie <i>v.</i> Leitch, 2nd February 1813, F.C. (<i>Rutherglen</i>) . . .	111, 114, 163, 372
280. Farquhar, 6 Jur. 66 (<i>Kilmalcolm</i>)	330
281. Fearn Common Agent <i>v.</i> Munro, 21st November 1810, F.C. . .	335
282. Ferguson <i>v.</i> Magistrates of Arbroath, Mor. 8502	411
283. Ferguson <i>v.</i> Gillespie, Mor. 15,768, affd. 3 Pat. 534 (<i>Arrochar</i>) . .	340
284. Fergusson <i>v.</i> Glasgow, Mor. 5157 (<i>Kilwinning</i>)	493, 507, 509
285. Ferguson <i>v.</i> Kincarth Parishioners, 1 Br. Supp. 624	346
286. Fergusson <i>v.</i> Officers of State, S. (Teinds) 73, (<i>Inch</i>)	342, 343
287. Fergusson <i>v.</i> Skirving, 12 D. 1145 (<i>Kirkpatrick-Durham</i>) . . .	523, 524
288. Fletcher <i>v.</i> Irvine, Mor. 3633	365
289. Flockhart <i>v.</i> Aberdour Kirk-Session, 8 M'P. 176	600
290. Fogo, Petitioner, 6 M'P. 970 (<i>Row</i>)	482
291. Fogo <i>v.</i> Caldwell, 7 M'P. 88 (<i>Row</i>)	484
292. Forbes and Kearn, Connell Par. 192 (<i>Forbes, Kearn, Tullynessle, Auchindoir</i>)	36
293. Forbes <i>v.</i> Gibson, 13 D. 341, affd. 1 Macq. 106 (<i>Symington</i>) . .	251
294. Forbes <i>v.</i> Miller, Mor. 5127 (<i>Borgue, Fenwick, Kirkanders</i>) 34, 249, 491	
295. Forbes <i>v.</i> M'William, Mor. 9931 (<i>Forbes</i>)	82, 99
296. Fordyce Presbytery <i>v.</i> Shanks, 11 D. 1361 (<i>Ruthven, Buckie</i>) . .	149, 558
297. Forgandenny Minister <i>v.</i> Heritors, 1 Br. Supp. 567	394
298. Forret <i>v.</i> Matters, Mor. 5139 (<i>Cults</i>)	258, 437, 444, 445
299. Forth Church Managers <i>v.</i> Darling, 25 R. 747, 1 F. 177	630
300. Fortrose Magistrates <i>v.</i> MacLennan, 8 R. 124 (<i>Fortrose, Rosemarkie, Chanonry</i>)	43, 115, 547
301. Foulis <i>v.</i> Blackfriars Vestry, Mor. 6581	615
302. Fraser <i>v.</i> Robertson, 1791, unreported (<i>Strichen</i>)	469
303. Fraser <i>v.</i> Turner, 21 R. 278 (<i>Dunfermline</i>)	185, 188
304. Fraserburgh Minister <i>v.</i> Heritors, Mor. 5140	453
305. Freeland <i>v.</i> Murray, Mor. 10,064 (<i>Methven</i>)	231
306. Froid <i>v.</i> Earl of Stair, 2 R. 76 (<i>Glenluce</i>)	322
307. Fullerton <i>v.</i> Richmond, Mor. 5123 (<i>Irvine</i>)	426
308. Fulton <i>v.</i> Dunlop, 24 D. 1027 (<i>Largs</i>)	224, 225
309. Galbraith <i>v.</i> Minister of Bo'ness, 21 R. 30	477
310. Galloway Bishop's Bairns <i>v.</i> Couper, Mor. 470	304
311. Galloway, Bishop of, <i>v.</i> Prebendaries of Chapel Royal, Mor. 15,627	258
312. Gardiner <i>v.</i> Dingwall, 2 S. 409 (<i>New Aberdour</i>)	412
313. Gardner <i>v.</i> Rathven Heritors, 1 D. 158	315, 324
314. Gaston Vicar <i>v.</i> Valentine, Mor. 7939	233
315. Gavin <i>v.</i> Trinity House of Leith, 2nd June 1825, F.C. (<i>North Leith</i>)	162
316. Gibson <i>v.</i> Hepburn, 1 Br. Supp. 699 (<i>Oldhamstocks</i>)	407, 564
317. Gilbert <i>v.</i> Buzzard, 2 Hag. Con. 333	193
318. Gilmour <i>v.</i> Sutherland, 38 S.L.R. 561 (<i>Loch Carron</i>)	264, 473
319. Glasgow Archbishop <i>v.</i> Predecessor, Mor. 15,897	302
320. Glasgow College <i>v.</i> Eglinton's Trustees, 7 D. 970 (<i>Kilbride</i>) . .	69
321. Glasgow College <i>v.</i> Jedburgh Parishioners, Mor. 14,790	300
322. Glasgow Magistrates <i>v.</i> MacLean, 1902, unreported (<i>Tron, Glasgow</i>)	518, 585
323. Glasgow, Earl of, <i>v.</i> Miller, 9 S. 370, affd. 7 W. & S. 185 (<i>Kirkintilloch</i>)	121, 126, 128, 538, 573, 582, 583

	PAGE
324. Glasgow, Earl of, <i>v. Murray</i> , 7 M.P. 6 (<i>Moonzie</i>)	376, 394, 402, 403
325. Glenmuick Case, Connell, Tithes, vol. i. p. 383	621
326. Gloag, Petitioner, 1 R. 187 (<i>Galashiels</i>)	415, 483
327. Gloag <i>v. M'Intosh</i> , Mor. 11,063, Elchies, Stipend, 8	289, 313
328. Gloag <i>v. Rutherford</i> , 11 M.P. 251 (<i>Galashiels</i>)	484
329. Goldie <i>v. Christie</i> , 6 M.P. 541 (<i>Arbuthnot</i>)	614
330. Gorbals Magistrates <i>v. Kirk-Session</i> , 2 S. 194 and 564	607, 610
331. Gordon <i>v. Earl of Fife</i> , Mor. 14,821 (<i>Strathdon</i>)	25
332. Gordon <i>v. Gordon</i> , 18 Jur. 595 (<i>Kincardine O'Neil</i>)	121, 136
333. Gordon <i>v. Monkquhitter Heritors</i> , 1 D. 789	324
334. Gordon <i>v. Ogilvie</i> , 5 Br. Supp. 540 (<i>Ordiequhill</i>)	261, 263
335. Gordon <i>v. Trustees of Widows Fund</i> , 14 S. 509, and 15 S. 15 (<i>Store</i>)	311, 553
336. Graham <i>v. Pate</i> , Mor. 11,063 (<i>Moffat</i>)	313
337. Grahame <i>v. Ogilvie</i> , Mor. 7955	257, 270
338. Grant <i>v. Davidson</i> , Mor. 9571, 2 Hailes, 1001	632
339. Grant <i>v. M'Intosh</i> , Mor. 10,763	265, 274
340. Grant <i>v. Macintyre</i> , 11 D. 1370 (<i>Kinlochspelve</i>)	311, 629
341. Gray <i>v. Laird of Cockpen</i> , 2 Br. Supp. 186 (<i>Duns</i>)	295
342. Gray <i>v. Dunbar</i> , Mor. 15,773 (<i>Kinnoull</i>)	339
343. Great Northern Railway Company <i>v. Inglis</i> , 13 D. 1315	524
344. Greenlaw <i>v. Heritors of Creich</i> , 5 Br. Supp. 513	398, 584
345. Greenock Magistrates <i>v. Greenock Gardeners</i> , 2 S. 44 (<i>Greenock New Church</i>)	166
346. Greenock Magistrates <i>v. Peters</i> , 19 R. 643, affd. 20 R. (H.L.) 42 (<i>Greenock Mid Parish</i>)	298, 316
347. Greenock Magistrates <i>v. Stewart</i> , Mor. 8019, and App. Kirk, No. 1, 5 Br. Supp. 414, <i>rev.</i> 2 Pat. 486 174, 175, 177, 178, 179, 192, 204, 205, 207, 215, 564	
348. Greig <i>v. Duke of Queensberry</i> , 21 Nov. 1809, F.C. (<i>Timwald</i>)	257, 262
349. Grierson <i>v. Campbell</i> , Mor. 11,784	348
350. Grierson <i>v. Ewart</i> , Mor. 5162, 2 Hailes, 799, 888 (<i>Troqueer</i>) 356, 374, 428, 431, 432, 448, 498, 495, 498	
351. Grindlay <i>v. Drysdale</i> , 11 S. 896 (<i>West Calder</i>)	82
352. Grozier <i>v. Kirkwood</i> , unreported (<i>Cathcart, Govan</i>)	71
353. Gunn <i>v. Dollar Parochial Board</i> , 23 S.L.R. 623	629
354. Guthrie <i>v. Laird of Makerstoun</i> , Mor. 10,137	372
355. Haddington Magistrates <i>v. Kennedy</i> , 21 D. 729	292, 336
356. Haldane <i>v. Ogilvie</i> , 10 M.P. 62 (<i>Kingoldrum</i>)	312, 330
357. Halyburton <i>v. Paterson</i> , Mor. 5138 (<i>Kinnoull</i>)	441
358. Hamilton <i>v. Athlinton</i> , Mor. 5134 (<i>Linton</i>)	566, 568
359. Hamilton <i>v. Minister of Cambuslang</i> , Mor. 10,570	595, 609, 616
360. Hamilton <i>v. Clason</i> , 4 S. 543 (<i>Dalzell</i>)	397, 398, 402, 405
361. Hamilton <i>v. Hamilton</i> , 6 S. 47 (<i>Bothwell</i>) 128, 130, 131, 134, 138, 574, 584	
362. Hamilton Magistrates <i>v. Duke of Hamilton</i> , 8 D. 844, affd. 7 Bell, App. 1	154, 158, 159
363. Hamilton <i>v. Harries</i> , Mor. 11,061	313
364. Hamilton <i>v. Maxwell</i> , Mor. 10,166	372

	PAGE
365. Hamilton v. Scott, Mor. 7630 (<i>Avondale</i>)	616
366. Hamilton, Duke of, v. Scott, 5 Paton 745, 1 Dow, 393 (<i>Strathaven</i>)	384, 386, 388, 391
367. Hamilton v. Tweedie, Mor. 5146	472
368. Hannay v. Grant, Mor. 14,989	456
369. Hannay v. Rutherford, Mor. 14,989	247
370. Hardie v. Linlithgow Kirk-Session, 18 D. 37	597, 600
371. Harlow v. Merchant Maiden Hospital, 4 Paton 356 (<i>Peterhead</i>)	116, 138, 150, 536, 537, 543
372. Harris v. His Creditors, 14 S. 964 (<i>Fearn</i>)	349
373. Harvey v. Bogle, Mor. 8012, 13,126 (<i>Glasgow City</i>)	615
374. Hastie v. M'Murtrie, 16 R. 715	89
375. Hay v. Presbytery of Duns Mor. 9911 (<i>Duns</i>),	82, 95
376. Hay v. Edinburgh Water Company, 12 D. 1240, affd. 1 Macq. 682	111, 513
377. Hay v. Hepburn, Mor. 8929	527
378. Hay v. Williamson, First Case, Mor. 5148 (<i>Arngask</i>)	185, 189, 191, 207
379. Hay v. Williamson, Second Case, Mor. 2492 (<i>Arngask</i>)	623, 624, 625
380. Henderson's Bairsns v. Debtors, Mor. 472	304
381. Hepburn, Mor. 9946	308
382. Highland Railway Company v. Heritors of Kinclaven, 8 M'P. 861	540, 541
383. Hill v. Wood, 1 M'P. 360 (<i>Coupar-Angus</i>)	200, 201, 220, 605
384. Hislop v. Figgins, 1 M'P. 32 (<i>Prestonpans</i>)	610, 611
385. Hodges v. Bryce, Mor. 5162 (<i>Kirknewton</i>)	497
386. Hog v. Ritchie, Connell Par. 297, 305 (<i>Kirkliston</i>)	399, 402
387. Hog's Creditors v. Magistrates of Edinburgh, Mor. 722, Elchies, Stipend, 5 (<i>Edinburgh, Tron</i>)	348
388. Hogg v. Auchtermuchty Par. Board, 7 R. 986	252
389. Home, Earl of, v. Duke of Buccleuch, Mor. 7972, 10,998 (<i>Colliston</i>)	256, 268
390. Home, Earl of, v. Crown, 5 Br. Supp. 867 (<i>Hutton</i>)	73, 78, 81
391. Home v. Galbraith, Mor. 15,900 (<i>Jedburgh</i>)	301
392. Home v. Swinton, Mor. Summary Application, App. 2 (<i>Ayton</i>)	333
393. Home v. Young, 9 D. 286 (<i>Eyemouth</i>)	9
394. Hope v. Minister of Craighall, Mor. 7943 (<i>Craighall and Ceres</i>)	234
395. Hopetoun, Earl of v. Earl of Rosebery, 13 S. 685 (<i>Dalmenny, Auldcaithy</i>)	78, 81, 83
396. Howden v. Earl of Haddington, 13 D. 522	334
397. Hume v. Rislaw, Mor. 15,637 (<i>Fogo</i>)	261
398. Hunter v. Duke of Roxburgh, Mor. 15,728 (<i>Ovenam</i>)	265
399. Hutcheson v. Cassilis, Mor. 14,788 (<i>Inch</i>)	293, 294
400. Hutchison v. Magistrates of Edinburgh, Mor. 467	305
401. Hutton v. Harper, 2 R. 893, affd. 3 R. (H.L.) 9 (<i>Cambusnethan, Wishaw</i>)	60, 632
402. Hyndman or Cunningham, 11th March 1818, F.C., foot-note	348
403. Imrie, Petitioner, 5 M'P. 1145, 6 M'P. 284 (<i>Penicuik</i>)	482, 483
404. Inch Heritors v. Minister, 8 M'P. 363	400, 401, 402
405. Inland Revenue v. Fry, 22 R. 422 (<i>Girvan</i>)	415

	PAGE
406. Innes v. Minister of Elgin, Rob. 69	146, 147
407. Inverury Second Minister Case, Connell Par. 146	292
408. Inverkeillor Minister v. Carmyllie Minister, 4 F. 719 (<i>Inverkeillor</i> , <i>Kingoldrum</i> , <i>Carmyllie</i> , <i>Dunnichen</i>)	342, 343, 344, 345
409. Inverkeithing Parishioners v. Lady Rosyth, Mor. 7914	140
410. Inverury Minister v. Leith, Connell Par. 278	379
411. Irvine v. Maxwell, 11 M'P. 489 (<i>Dalreoch</i> , <i>Cardross</i>)	53
412. Irvine v. Trustees of Widows Fund, 16 S. 1024 (<i>Foss</i> , <i>Kilmenny</i>)	6, 311, 553
413. Irvine Heritors v. Dundonald Heritors, 3 S. 173	67, 68, 70
414. Irvine Heritors v. Minister, Connell Par. 271	368
415. Jackson v. Cochrane, 11 M'P. 475 (<i>Cupar</i>)	338
416. Jedburgh Minister v. ———, 18th May 1809, F.C., foot-note	498
417. Jedburgh Minister v. Heritors, 5 Br. Supp. 418	621
418. Johnston v. Cowan, 1886, unreported (<i>Bathgate</i>)	534
419. Johnston v. Heritors of St. Cuthbert's, Mor. 14,834, and 3d March 1802, F.C. (<i>St. Cuthbert's</i> , <i>North Leith</i>)	40, 292, 343, 344
420. Keith v. Gray, Mor. 14,786 (<i>Strabrock</i>)	293
421. Kellie v. Minister of Carnbee, Mor. 15,710	317
422. Kennedy v. Bishop of Orkney, 1 Br. Supp. 569 (<i>Harray and</i> <i>Birsay</i>)	238
423. Kennedy v. Richardson, 9th December 1818, F.C. (<i>St. Madocs</i>)	327
424. Ker v. Cardine Parishioners, Mor. 461	303
425. Ker v. Morumside Parishioners, Mor. 471	305
426. Kerse v. Reid, Mor. 5132 (<i>Alva</i>)	447, 568
427. Kettins Stipend, mentioned in Simpson, 7th June 1809, F.C.	347
428. Kier v. Lamb, 1 Br. Supp. 69	357
429. Kilmadock Minister, cited Mor. Glebe, App. 5	491
430. Kilmalcolm Minister v. Heritors, 3 R. 32	328
431. Kilmalcolm Minister v. M'Donald, 3 S.L.T. 128	617
432. Kilmarnock Magistrates v. Aitken, 11 D. 1089 (<i>Kilmarnock High</i> <i>Church</i>)	27, 165, 298, 316
433. Kilrenny Minister v. Heritors, 2 D. 1047	324
434. Kilsyth v. Stirling Presbytery, Rob. 65 (<i>St. Ninians</i>)	39
435. Kilwinning Kirk-Session v. Trades, mentioned Mor. 8013	215
436. Kincardine O'Neil, Connell Tithes, vol. i. p. 119	619
437. King v. Kynneir, Mor. 7938	231
438. King's College, Aberdeen, v. Earl of Northesk, Mor. 7230, 11,149	270
439. King's College, Aberdeen, v. Heritors of New Machar, Mor. 8503	382, 384, 393, 394
440. King's College, Aberdeen, v. Heritors of Old Machar, Elchies, Manse, No. 2	363, 378
441. Kinghorn Heritors v. Magistrates, 24 R. 704	151, 157, 158, 514, 537
442. Kingoldrum Heritors v. Minister, 1 M'P. 325	399, 401, 402
443. Kingsbarns Minister v. Erskine, Mor. 5140	438, 567
444. Kingsbarns Minister v. Hay, Mor. Glebe, App. 2	438, 445, 567
445. Kinkell, Keithhall, and Kintore Union, Connell Par. 169	34
446. Kinnaird v. Errol Common Agent, 13 D. 97	314
447. Kinnaird and Farnwell Union, Connell Par. 34, 181	31
448. Kinnaird v. Mathewson, 4 Paton, 429 (<i>Inchture</i>)	162

	PAGE
449. Kinnerny, Cluny, and Midmar Union, Connell Par. 159 . . .	34
450. Kinnore, Dumbonan, and Huntly Union, Connell Par. 154 . . .	36
451. Kinnoull, Petitioner, 2 D. 1458 (<i>Rattray</i>) . . .	82
452. Kinnoull v. Auchterarder Presbytery, 16 S. 661, affd. M'L. & R. 220 (<i>Auchterarder</i>) . . . 82, 98, 99, 246, 300, 455	92, 99
453. Kinnoull v. Ferguson, 3 D. 778, affd. 1 Bell 662 (<i>Auchterarder</i>) . . .	310
454. Kinnoull v. Gordon, 5 D. 12, rev. 4 Bell's App. 126 (<i>Auchterarder</i>) . . .	335
455. Kinnoull, Earl of, v. Macdonald, S. (Teinds) 54 (<i>Kinnoull</i>) . . .	341
456. Kinnoull, Earl of, v. Macdonald) S. (Teinds) 105 (<i>Kinnoull</i>) . . .	346, 347
457. Kinross Stipend, mentioned in Simpson, 7th June 1809, F.C. . . .	293
458. Kirk v. Gilchrist, Mor. 14,786 . . .	36
459. Kirkbryde and Kirkconnel Case, Connell Par. 155 (<i>K. K. Durisdæer,</i> <i>and Sanguhar</i>) . . .	413
460. Kirkcudbright Manse, Connell Par. 273 . . .	288
461. Kirkcudbright Stipend, 1 Connell Tithes, 399 . . .	399
462. Kirkliston Manse, referred to, 15 S. 1025 . . .	249
463. Kirkmichael and Killcudden Union, Connell Par. 58 . . .	161
464. Kirknewton Heritors v. Easter Calder Heritors, Connell Par. 161 26, 36, 212, 249	68
465. Kirknewton Common Agent v. Liston, S. (Teinds) 271 . . .	246, 455
466. Kirriemuir Minister v. Heritors, Mor. 9969 . . .	333
467. Knox v. Law, Mor. 4420 . . .	233
468. L., Parishioners of, v. Ker, Mor. 7937 . . .	450, 451, 506
469. Laidlaw v. Elliot, Mor. Glebe, App. 3 (<i>Peebles</i>) . . .	419
470. Lammond v. Bennet, Mor. 5137 (<i>Markinch</i>) . . .	529
471. Lanark Heritors v. Crown Factor, Elchies, Patronage, 6 . . .	303, 306
472. Latta v. Edinburgh Ecclesiastical Commissioners, 5 R. 266 (<i>St.</i> <i>John's, Edinburgh</i>) . . .	322, 334, 335
473. Lauder Kirk-Session v. Goodman of Galashiels, Mor. 7913 . . .	240, 349, 480
474. Lawrie v. Halket, Mor. Glebe, App. 4 (<i>Newburn</i>) . . .	258
475. Lawtie v. Galbraith, Mor. 15,889 (<i>Chirnside</i>) . . .	629
476. Learmonth v. Magistrates of Edinburgh, 20 D. 190 (<i>St. Cuth-</i> <i>bert's, Edinburgh</i>) . . .	303
477. Learmonth v. Paterson, 20 D. 418 (<i>West Calder</i>) . . .	303
478. Leslie v. Glenmuick Minister, Mor. 11,001 . . .	34
479. Leslie v. Orkney Commissioners of Supply, 20 S.L.R. 362 (<i>Hurray</i> <i>and Birsay</i>) . . .	333
480. Leswald Parishioners v. Minister, Mor. 472 . . .	46
481. Lethnot, Lochlee, and Novar Union, Connell Par. 153 . . .	600
482. Lewars v. Earl of Haddington, Mor. 7464 . . .	36, 212
483. Lewis Disjunction Case, Connell Par. 66 (<i>Uig, Barvas, Lochs,</i> <i>Stornoway</i>) . . .	570
484. Liddle v. Bathgate Kirk-Session, 16 D. 1075 . . .	610
485. Liff and Benvie Union, Connell Par. 168 . . .	376
486. Lindsay, Forbes-Tithes, 218 (<i>Kilbrandon</i>) . . .	453, 466
487. Linlithgow Magistrates v. Kirk-Session, Mor. 2304 . . .	348
488. Linlithgow Manse Case, Connell Par. 293 . . .	
489. Linning v. Baillie, Mor. 5145 (<i>Walstoun</i>) . . .	
490. Linton Minister v. Creditors, referred to in Smith, 13th December 1815, F.C. . . .	

	PAGE
491. Liston v. Smythe, Hume, 475 (<i>Redgorton</i>)	463, 466
492. Lithgow v. Wilkieson, Mor. 9637 (<i>Melrose</i>)	161, 209
493. Little Dunkeld Minister v. Heritors, Mor. 5153	34, 240, 249, 480
494. Livingstone, 3 D. 1278 (<i>Cambusnethan</i>)	553, 555
495. Livingstone v. Clason, 7 D. 554 (<i>Cambusnethan</i>)	555
496. Livingstone v. Grant, 13 D. 394, 32 Jurist. 514 (<i>Cambusnethan</i>)	301, 310
497. Livingstone v. Presbytery of Hamilton, 8 D. 898; affd. 6 Bell, 469 (<i>Cambusnethan</i>)	555
498. Lochlee Minister, Connell, Tithes, vol. i. p. 454	625
499. Lochlee Minister v. Dalhousie's Tutors, 17 R. 1060; affd. 18 R. (H.L.) 72	568
500. Lockerby v. Stirling, 13 S. 978 (<i>Cadder</i>)	454, 455, 469, 475
501. Lockhart v. Lockhart, 10 S. 243 (<i>Lanark</i>)	151, 373, 514, 543
502. Logan v. Reid, Mor. Glebe, App. 1 (<i>New Cumnock</i>)	476, 477
503. Logie Heritors v. Erskine, Mor. 15,691	625
504. Logie Minister v. Heritors, Mor. 7957	258, 567
505. Logie Minister v. Heritors, 6 M'P. 82	622
506. Lovat v. Fraser, 8 D. 316 (<i>Kilmorack</i>)	220, 221
507. Lugton v. Edmonston, Mor. 9895	74
508. Luke v. Brown, 10 S. 307 (<i>Tron, Edinburgh</i>)	249
509. Luke v. Magistrates of Edinburgh, 10 S. 307; affd. 6 W. & S. 241 (<i>Tron, Edinburgh</i>)	96, 97, 100
510. Lynedoch v. Liston, 14 S. 374 (<i>Redgorton</i>)	68
511. Lynedoch v. Smythe, 6 S. 791 (<i>Methven</i>)	124, 126, 133, 142, 573
512. Madderty Common Agent v. Moray, 9th July 1817, F.C.	340
513. Madderty Minister v. Heritors, Bell Fol. Cases, 76; Mor. 5163	240, 477
514. Magdala Chapel v. Drysdale, Mor. 11,148	270
515. Mains and Strathmartin Union, Connell Par. 193	32, 36
516. Mairner v. MacNicol, Mor. 15,711 (<i>Jura and Colonsay</i>)	316
517. Maitland v. May, 1 Hailes, 109 (<i>Tillicoultry</i>)	184, 213
518. Malcolm v. Irving, Mor. 14,791 (<i>Hollywood</i>)	266
519. Mansfield v. Minister of Cummertrees, Mor. 14,832	295
520. Mansfield, Earl of, v. Duke of Queensberry, Mor. Teinds, App. 9 (<i>Dornock</i>)	294
521. Mansfield, Earl of, v. Wright, 2 Shaw App. 104 (<i>Scone</i>)	183, 205, 210, 211, 219, 583
522. Marchmont v. Heritors of Eccles, Mor. 7924, and App. Kirk. No. 2, 5 Br. Supp. 558	187, 140, 149, 152, 156, 157, 159
523. Marshall v. Carnegie, Mor. 8495 (<i>Brechin</i>)	441, 567
524. Marshall v. Drumkilbo, 1 Br. Supp. 62 and 378 (<i>Dunkeld</i>)	269
525. Marshall v. Town of Kirkcaldy, Mor. 14,795, Elchies, Stipend, 1	291, 316
526. Mathers v. Lawrie, 14 D. 433	615
527. Maxwell v. Blair, Mor. 9522 (<i>Dunfries, Kirkcudbright, Kelton</i>)	632
528. Maxwell v. Blair, 3rd July 1816, F.C. (<i>Eastwood</i>)	335, 340
529. Maxwell v. Dow, 2nd June 1813, F.C. (<i>Cathcart</i>)	332
530. Maxwell v. Drumlanrig, Mor. 7941	234
531. Maxwell v. Gordon, 4 Dow, 279 (<i>Anwoth</i>)	525, 538, 577, 574, 581
532. Maxwell v. Langholm Presbytery, 40 Jur. 13, 5 S.L.R. 16 (<i>Half- Morton</i>)	376
533. Maxwell v. Rodger, Mor. 10,638	257, 262

	PAGE
534. Meathie Union Case, Connell Par. 57 (<i>Inverarity and Meathie</i>)	46
535. Menzies v. Glenurchy, Mor. 14,788	292
536. Menzies v. Lerwick Heritors, Connell Par. Supp. 44	124, 126
537. Mercer v. Minister of Lethendy, mentioned Mor. Glebe, App. 6	497
538. Mercer v. Williamson, 3 Paton, 43 ; 3 Bligh, 90 (<i>Lethendy</i>)	379
539. Midcalder Stipend Case, Connell Tithes, 1, 358	287
540. Middleton v. Anderson, 4 D. 957 (<i>Culsalmund</i>)	82
541. Miller v. Craig, 1 Hailes, 329 (<i>Neilston</i>)	512
542. Milligan v. Wedderburn, Mor. 14,816, 2 Paton, 621 (<i>Kirkden</i>)	289, 318, 325
543. Milne v. Wills, 7 M'P. 406 (<i>Montrose</i>)	169
544. Minister's Executors v. Parishioners, Mor. 10,325	313, 337
545. Minto v. Pennell, 1 R. 156 (<i>Ballingry</i>)	340
546. Mitchell v. Heritors of Barr, 3 S. C. Rep.	297
547. Mitchell v. Douglas, Mor. 14,827 (<i>Lamington</i>)	295, 334
548. Moir v. Salton, Mor. 10,169 (<i>Fraserburgh</i>)	372
549. Moncrieff v. Couper, Mor. 8502	382, 393
550. Moncrieff v. Maxton, Mor. 7331, 9909	98, 99, 301
551. Monteith v. Hope, 4 Br. Supp. 261 (<i>Falkirk</i>)	209, 214
552. Monteith v. Ker, Mor. 8497 (<i>Duddingston</i>)	355
553. Montrose Kirk-Session v. Tailyour, 6 S.L.T. 125	168
554. Montrose Magistrates v. Scott, 10 S. 211	438, 444, 445, 451
555. Montrose Magistrates v. Strachan, Mor. 13,118	615
556. Montrose Ministers v. Magistrates, Mor. 7915	140
557. Montrose, Duke of, v. Strathblane Heritors, Elchies, Patronage, 2	79
558. Moray v. Nicol, 3 M'P. 39 (<i>Dalgety</i>)	491
559. Morebattle Minister v. Heritors, Mor. 11,003	264
560. Morham Minister v. Binston, Mor. 8499	511, 589
561. Morham Parson v. Laird of Bearford, Mor. 9897	81
562. Morrins v. Balcaskie, Mor. 15,628 (<i>Carnbee</i>)	342
563. Morton v. Scot, Mor. 14,784 (<i>Ettrick</i>)	277, 278, 293
564. Muckarsie Parson v. Abercromby, Mor. 7935	232
565. Muckhart Manse Case, Connell Par. 293	376
566. Murray v. Edinburgh Magistrates, 1 R. 482 (<i>Old Kirk and Canongate, Edinburgh</i>)	53
567. Murray v. Presbytery of Glasgow, 12 S. 191 (<i>Kirkintilloch</i>)	120, 121, 123, 577, 590
568. Murray v. Trotter, 1 Br. Supp. 436 (<i>Tweedsmuir</i>)	446
569. Mushet v. Duke of Buccleuch, Mor. 5135 (<i>Hassendean</i>)	565
570. Mutter v. Earl of Selkirk, Mor. 8513 (<i>Kirkcudbright</i>)	368
571. M'Aulay v. Auchenleck, Mor. 8506 (<i>Queensferry</i>)	385, 392, 408
572. M'Bean v. Young, 21 D. 314 (<i>Elgin</i>)	187, 189, 191, 199, 202, 203
573. M'Callum v. Grant, 4 S. 527 (n.e.), 535 (<i>South Leith</i>)	246, 247, 426, 455, 456, 460, 480, 529
574. M'Crone v. Campbell, 5 S. 42. (<i>Cathcart</i>)	160
575. M'Dermets v. Montgomery, Mor. 464 (<i>Ayr</i>)	305
576. M'Diarmid v. Earl of Moray, 24 D. 715 (<i>Callander</i>)	330
577. M'Donald v. Campbell, 9 Jurist, 5 (<i>Fortingall, Kinloch-Rannoch</i>)	63, 616
578. Macdonald v. Gordon, 6 S. 600 (<i>Kilmonivaig</i>)	98, 155
579. M'Dougall v. Blackie, 1 M'P. 503 (<i>Gorbals</i>)	149, 558

	PAGE
580. Macdougall v. Oban Kirk-Session, 17 S.L.R. 501 (<i>St. Columba's, Oban</i>)	53, 61
581. Macdougall v. Duke of Portland, 20 R. 105 (<i>Berriedale</i>)	296
582. Macechern v. Inverness Heritors, 22 S.L.R. 604 (<i>Inverness Gaelic Church</i>)	121
583. Macfarlane v. Presbytery of Cupar, 16 S.L.R. 480 (<i>Cupar</i>)	87
584. Macfarlane v. Monklands Railway Company, 2 M.P. 519 (<i>Slamannan</i>)	111, 513, 540, 541
585. M'Garroch v. Scott, Elchies, Stipend, 2	337, 529
586. M'Gill v. Earl of Cassilis, 1 Br. Supp. 501	300
587. M'Gough v. Lancaster Burial Board L. R., 21 Q.B.D. 323	202
588. M'Intosh v. Fraser, 3 S. 508 (<i>Inverness</i>)	164, 165
589. M'Jorie v. Caerlaverock Heritors, Mor. 8498	564
590. Mackay v. Wood, 17 R. 38 (<i>Brechin</i>)	166, 167
591. Mackenzie v. Fraser, 1 S. 394 (<i>Stornoway</i>)	474
592. M'Kenzie v. M'Kenzie, 12 S. 151 and 13 S. 1014 (<i>Lochcarron</i>)	376, 390, 399, 401, 402
593. M'Kenzie v. Macrae, 4 S. 146 and 8 S. 683 (<i>Barvas</i>)	430, 432, 434, 443
594. M'Kenzie v. Selait Parishioners, Mor. 14,785	74, 300
595. Mackie, Petitioner, 1 R. 934 (<i>Elgin</i>)	486
596. Mackie v. Neill, Elchies, Glebe, 2	480
597. Mackinla's Commissioners v. Mackinla, 2 Br. Supp. 528	391
598. M'Lagan v. Brown, 14 R. 1083 (<i>St. Margaret's, Edinburgh</i>)	311
599. M'Laren v. Clyde Trustees, 4 M.P. 58, affd. 6 M.P. (H.L.) 81 (<i>Renfrew</i>)	112, 513, 541
600. M'Lea v. Walker, 1 Bligh, 535 (<i>Rothesay</i>)	250
601. M'Lean v. Wighton, 3 S. 318 (<i>Gorbals</i>)	314, 324
602. M'Lean v. Earl of Elgin, Connell Par. 382 (<i>Dunfermline</i>)	443
603. M'Leod, Petitioner, 8 M.P. 955 (<i>Blair-Atholl</i>)	482
604. M'Leod v. Carment, 8 S. 475 (<i>Rosskeen</i>)	119, 121, 122, 123, 133, 135, 137, 397
605. M'Millan v. Presbytery of Kintyre, 6 M.P. 36 (<i>Kilcalmonell</i>)	432, 433, 489, 492, 496, 499
606. MacNaughton v. Magistrates of Paisley, 13 S. 432	140, 608
607. M'Neill v. Robertson, 14 S. 849 (<i>Stranraer</i>)	112, 165, 184, 298, 514, 572, 582
608. M'Neill v. Nicolson, 6 S. 422 (<i>Barra</i>)	130, 131, 133, 137, 430, 474, 534
609. Macqueen v. Pearson, 1 Br. Supp. 604 (<i>Carmichael</i>)	303
610. Macqueen v. Marquis of Douglas, Mor. 15,888 (<i>Carmichael</i>)	301
611. Macrae v. Wilson, 11 D. 1488 (<i>Hawick</i>)	590
612. N. v. Parishioners of Aytoun, Balfour's Practicks, 35	105, 107
613. N. v. Pitcarne, Mor. 7963	232
614. Nairn v. Boswall, Mor. 5137 (<i>Dysart</i>)	419, 440
615. Nairn v. Tweedie, Mor. 5143, 5146 (<i>Linton</i>)	265, 472
616. Neilston Case, unreported, 1865	622
617. Newton Minister v. Heritors, Mor. Glebe, App. 6	479
618. Nicholson v. Galloway, 2 S. 398 (<i>Whithorn</i>)	500
619. Nicoll v. Hunter, 7 S. 479 (<i>St. Leonard's, St. Andrews</i>)	141, 373
620. Nicolson v. Porteous, Mor. 5136 (<i>Lasswade</i>)	440, 447

	PAGE
621. Nisbet v. St. Cuthbert's Kirk-Session, Mor. 8016, 5 Br. Supp. 599	609, 612, 615
622. Nisbet v. Magistrates of Montrose, Mor. 8511, note	368
623. North Berwick Stipend Case, 1 Connell, Tithes, 353	287
624. North Leith Minister v. Merchants of Edinburgh, Mor. 10,890	274
625. Officers of State v. Bremner, 4 S. 832 (<i>Walls and Flotta</i>)	242
626. Officers of State v. Gordon, 13th November 1821, F.C. (<i>Cluny</i>)	82
627. Officers of State v. Ouchterlony, 2 S. 437, affd. 1 W & S. 533 (<i>Arbroath</i>)	220
628. Officers of State v. Stewart, 20 D. 1331 (<i>Auchtergaven</i>)	232
629. Ogilvie, Petitioner, 5th June 1811, F.C. (<i>Midmar</i>)	335
630. Ogilvie v. Heritors of Kirriemuir, Mor. 9949	100
631. Ogston v. Stewart, 21 R. 282, rev. 23 R. (H.L.) 16 (<i>Banchory Devenick</i>)	419, 473
632. Old Deer Minister v. Heritors, 23d November 1808, F.C.	327
633. Old Machar, Second Minister Case, Connell Par. 131	291
634. Old Meldrum Minister v. Heritors, 1 Connell, Tithes, 442	345
635. Oliphant v. Presbytery of St. Andrews, 38 S.L.R. 484 (<i>St. Leonard's, St. Andrews</i>)	586, 587
636. Oliver v. Maryhill Heritors, 9 S.L.T. 201 (<i>Maryhill</i>)	52
637. Olig Heritors v. Minister, 13 D. 1332	395, 396, 397, 535, 574
638. Orwell Glebe, Connell Par. 227	468
639. Oswald v. Martin, 7 Jurist, 355 (<i>Kirkcaldy</i>)	330
640. Paisley Case, 5 Br. Supp. 418	621
641. Panbride Minister v. Maule (No. 1), 18th May 1809, F.C.	498, 503, 505
642. Panbride Minister v. Maule (No. 2), 24th January 1815, F.C.	492
643. Panmure v. Presbytery of Brechin, 18 D. 197 (<i>Brechin</i>)	244, 249, 371, 424, 425, 426, 428, 433
644. Panmure v. Halkett, 22 D. 1357 (<i>Brechin</i>)	427, 465
645. Panmure v. Sharpe, 1 D. 840 (<i>Brechin</i>)	558
646. Park v. Maxwell, Mor. 8503 (<i>Cathcart, Carmunnock</i>)	28, 41, 42, 377, 546
647. Paterson v. Beattie, 7 D. 561	218, 221
648. Paterson v. Paterson, 15 R. 1060 (<i>Tarbolton</i>)	631
649. Paton v. Glasgow University, 2 M'P. 1307, rev. 4 M'P. (H.L.) 26 (<i>Partick, Govan</i>)	47, 48
650. Pearson v. Magistrates of Dunbar, 24 D. 1357 (<i>Belhaven, Dunbar</i>)	63, 529
651. Peden v. Magistrates of Paisley, Mor. 9644	161
652. Peebles Heritors v. Dalglish, Mor. 5163	448, 493, 497
653. Peebles Magistrates v. Kirk-Session, 1 R. 1139, affd. 2 R. (H.L.)	117 140
654. Peebles Minister v. Heritors, 24 R. 293	322
655. Pencaitland Kirk-Session v. Wood, 21 R. 214	600
656. Pennel v. Malcolm, 7 M'P. 1078 (<i>Ballingry, Auchterderran</i>)	38, 40
657. Perry's Almshouses, 1899, 1 Ch. 21	344
658. Peter v. Mitchelson, Mor. 10,640 (<i>Terreggh</i>)	266
659. Philorth v. Heritors of Rathan, Mor. 5620	181, 192, 264, 269
660. Pitsligo Heritors v. Gregor, 6 R. 1062	415, 588
661. Pittenweem v. Durie, Mor. 8497	356
662. Playfair v. Macdonald, 5 Paton, 266	529
663. Pollock v. Glasgow University, 3 M'P. 968 (<i>Old Monkland</i>)	337
664. Pollock v. Heritors of Killalin, Elchies, Stipend, 3	285

	PAGE
665. Polmont Erection Case, Connell Par. 72 (<i>Polmont, Falkirk</i>)	46
666. Port Parishioners, Mor. 8499	582
667. Porter v. Auld, 13 D. 268 (<i>Moneydie</i>)	613, 615
668. Porterfield v. Gardner, 8 S. 277 (<i>Kilmalcolm</i>)	572, 578, 581
669. Potter v. Kippen Heritors, 4 Br. Supp. 691	411, 412, 565
670. Potter v. Ure, Mor. 5129 (<i>Kippen</i>)	429, 454, 568, 584
671. Prestonkirk Minister v. Earl of Wemyss, Mor. Stipend, App. 6, affd. 5 Paton, 210	289, 292, 310, 619, 620
672. Pringle v. His Minister, 5 Br. Supp. 903	491, 497
673. Pringle v. M'Lagan, Hume, 808 (<i>Melrose</i>)	97
674. Procurator of Church v. Officers of State, S. (Teinds) 148 (<i>Gorbals</i>)	300, 427
675. Queensberry v. Carruthers, Mor. 15,662 (<i>Middleby</i>)	294
676. Queensberry v. Gibson, 7 S. 418 (<i>Lockmaben</i>)	473
677. Queensberry v. Richardson, Connell Par. 293 (<i>Kirkconnell</i>)	376
678. Queen's College, Provost of, v. Laird of Buccleuch, Mor. 7934	232
679. Rainie v. Magistrates of Newton-on-Ayr, 22 R. 633, 24 R. 606	298, 316
680. Ramsay v. Roxburgh, Mor. 15,626	256, 266
681. Ramsay v. Moray, mentioned in Maxwell v. Blair, 3 July 1816, F.C.	335
682. Rattray Minister, Petitioner, 5 S.L.R. 659	482
683. Ravelston Case, Connell Par. 32 (<i>St. Cuthbert's, Corstorphine, Colinton</i>)	28
684. Reay v. Falconer, Mor. 5151 (<i>Edrachilles</i>)	471, 478, 568
685. Reid v. Heritors of Beith, 1 Hailes, 74	285
686. Reid v. Commissioners of Woods, 12 D. 1211 (<i>Glasgow Barony, Maryhill</i>)	40, 52, 54, 112, 511
687. Reid v. Ferguson, 9 S.L.R. 232	152
688. Reid v. Melvil, Mor. 15,634 (<i>North Leith</i>)	258, 262
689. Renfrew Fiars, Elliot T.C.P. 222	332
690. Renton v. Feuars of Coldingham, Mor. 2840, 16,473	236, 275
691. Rescobar Minister v. Carnegie, 7 M'P. 514 (<i>R. and Aberlemno</i>)	68
692. Richmond v. Fife's Trustees, 6 S. 701 (<i>Urquhart</i>)	142, 145, 148, 173
693. Richmond v. Officers of State, 7 M'P. 1020 (<i>Ardoch</i>)	341
694. Richmond v. Orwell Common Agent, 4 M'P. 554	335
695. Robertson and Wiston Union, Connell Par. 180	249
696. Robertson Petitioner, 23 R. 526 (<i>St. Ninian's</i>)	485
697. Robertson v. Murdoch, 8 S. 587 (<i>Barony, Glasgow</i>)	525
698. Robertson v. Earl of Rosebery, Mor. 8515 (<i>Dalmenny</i>)	398, 584
699. Robertson v. Salmon, 5 S.L.R. 405 (<i>Paisley</i>)	188, 203
700. Rosebery, Earl of, Petitioner, 15 D. 126 (<i>Dalmenny</i>)	82
701. Ross v. Haddington, 3 S. 115 (<i>Canongate, Edinburgh</i>)	69, 71
702. Ross v. Vassals, Mor. 7985	446
703. Rothes Dundurcus and Boharrn Union Case, Connell Par. 190	249
704. Rothesay Augmentation, 24th May 1810, F.C.	331
705. Rothiemay Glebe, Connell Par. 231	468
706. Rough v. Ker, Mor. 5124, 8497 (<i>Inverkeithing, Rosyth</i>)	249, 355, 358, 409
707. Roxburgh v. Miller, 3 R. 728, rev. 4 R. (H.L.) 76 (<i>Jedburgh Edgerston</i>)	42, 114, 159, 547
708. Rue v. Fullerton, Mor. 7956	336
709. Rule's Relict v. Magistrates of Stirling, Mor. 11,002	258, 259, 262
710. Russell, Petitioner, 5 S.L.T. 334 (<i>Leslie</i>)	480, 517

	PAGE
711. Russell v. Bute, 10 R. 302 (<i>Rothsay</i>)	
173, 185, 189, 191, 200, 201, 203, 205, 208, 209, 210	
712. Rutherford v. Stewart, Connell Par. Supp. 66 (<i>Muirkirk</i>)	591
713. St. Andrews Case, Connell Par. App. 79	154, 163
714. St. Andrew's Kirk-Session v. Magistrates of Edinburgh, 13 S. 391	
144, 145, 146, 147, 607, 608	
715. St. Andrews University v. Commissioners of Woods, 16 S. 1350	
(<i>St. Andrews</i>)	314
716. St. Clair v. Alexander, 2 Hailes, 720 (<i>Lasswade</i>)	152, 161
717. Sattel Manse Case, Connell Par. 299	397
718. Sanderson v. Macfarlane, 6 M'P. 701 (<i>Duddingston</i>)	580
719. Sauchenford Disjunction Case, Connell Par. 55 (<i>Sauchenford</i> , <i>St. Ninian's</i>)	46
720. Scoonie Minister, Petitioner, 23 S.L.R. 322	483
721. Scot v. Earl of Moray, Mor. 8511, note (<i>South Leith</i>)	368
722. Scot v. Ramsay, 5 S. 367 (<i>Corstorphine</i>)	243, 462
723. Scott v. Bell, 12 Poor Law Magazine, 354 (<i>Forgandenny</i>)	617
724. Scott v. Macdonald, 11th March 1818, F.C. foot-note, affd. 1 S. App. (<i>Glenbucket</i>)	349
725. Scottish North-Eastern Railway Company v. Gardiner, 2 M'P. 537 (<i>Coupar-Angus</i>)	111, 513, 541, 546
726. Scrimgeour v. Murray, Mor. 464	305
727. Scrimgeour v. Murray's Executors, Mor. 463	247, 455, 480
728. Selkirk v. Duke of Buccleuch, 8 M'P. 121 (<i>Yarrow</i>)	462, 463, 464, 465, 466, 473
729. Selkirk Heritors v. Duke of Roxburgh, Mor. 7915	107, 112
730. Selkirk Kirk v. Stuart, Mor. 7913	107
731. Selkirk Presbytery v. Scott, Mor. 15,823 (<i>Ancrum</i>)	66, 67, 68
732. Semple v. His Parishioners, Mor. 11,000	259, 262
733. Shaw v. Forbes, 5 S. 761, affd. 4 W. & S. 300 (<i>Falkirk</i>)	102, 106, 108, 112, 525, 548, 549, 583
734. Shaw v. Heritors of Robertson, Mor. Stipend, App. 5	316
735. Shaw v. Countess of Winton, Mor. 7913	107
736. Sheils' v. Magistrates of St. Andrews, Mor. 466	302
737. Shettlestone Case, 1868, unreported	622
738. Shiels Relict v. West Calder Parishioners, Mor. 10,437	306
739. Shiels v. Heritors of Channellkirk, 13 S. 1018	386, 387, 398, 584
740. Simpson v. Ewing, No. 1, 10 R. 313 (<i>Bonhill</i> , <i>Kilmarnoch</i> , <i>Luss</i>)	343, 345
741. Simpson v. Ewing, No. 2, 13 R. 594 (<i>Bonhill</i>)	322
742. Simpson v. Jack, 16 R. 131 (<i>Kingoldrum</i>)	349
743. Simpson v. King's College of Aberdeen, 7th June 1809, F.C. (<i>New Machar</i>)	346
744. Simpson v. Somers, 14 D. 924 (<i>Barry</i>)	247, 248, 455, 456, 480
745. Sinclair v. Magistrates of Kinghorn, Mor. 7918	151, 154, 157, 158, 514, 536, 537
746. Skene Minister v. Heritors, 1 Br. Supp. 731, 2 Br. Supp. 183	253, 266
747. Skene v. Minister of Skene, Mor. 14,831	295
748. Skirving v. Vernor, Mor. 7930 (<i>Inveresk</i>)	157, 161
749. Skye Erection Case, Connell Par. 75 (<i>Portree</i> , <i>Snizort</i> , <i>Kilmuir</i> , <i>Strath</i> , <i>Sleat</i> , <i>Small Isles</i>)	46

	PAGE
750. Smeaton v. St. Bothan's Relict, Mor. 461	363
751. Smith, 4 S.L.R. 109 (<i>Crawford, Leadhills</i>)	49, 50
752. Smith v. Presbytery of Abertarff, 4 D. 1476 (<i>Urquhart and Glenmorriston</i>)	6, 554
753. Smith v. Crawford, 4 S. 738 (<i>Dalry</i>)	157, 158, 159
754. Smith v. Hunter, 5th March 1823, F.C. App. 1 (<i>Eyemouth, Swinton</i>)	343
755. Smith v. Earl of Moray, 13th December 1815, F.C. (<i>Petty</i>)	348, 349
756. Smith v. Heritors of Prestonpans, 29th November 1902	586
757. Smith v. Heritors of Prestonpans, No. 2, 27th January 1903	629
758. Smith v. Duke of Portland, 22d June 1814, F.C. (<i>Galston</i>)	331
759. Smollett v. Simpson, 12 R. 1150 (<i>Bonhill</i>)	339, 340
760. Snow v. Hamilton. Mor. 10,167 (<i>Old Monkland</i>)	452
761. S.P.C.K. v. Magistrates of Edinburgh, 12 D. 1219 (<i>Edinburgh Gaelic Church</i>)	7, 61, 64
762. South Leith Heritors v. Scott, 11 S. 75	174, 175, 204, 205, 209, 215, 216, 564
763. Southwick Glebe, 1901, unreported (<i>Southwick</i>)	487
764. Speirs v. Fleming, 9 S. 659 (<i>Neilston</i>)	597
765. Spence v. Craig, Mor. 465	305
766. Spence v. Hall, 1st December 1808, F.C. (<i>Old Cambus, Cockburnspath</i>)	186, 189, 207
767. Spottiswood v. Kirkpatrick, Elchies, Teinds, 32	276
768. Stair Stipend, 1 Connell, Tithes, 400	288
769. Steel v. Dalrymple, ¹ Mor. 5161, 7439 (<i>Heriot</i>)	568
770. Steel v. Kirk-Session of St. Cuthbert's, 18 R. 911	185, 188, 194, 200, 201, 203, 209
771. Steele v. His Parishioners, Mor. 5131, 8498, and 8562 (<i>Lochnaben</i>)	378, 404, 411, 412, 413, 497, 504, 536, 565, 566, 584
772. Stephen v. Anderson, 15 R. 72 (<i>Elgin</i>)	150, 151, 161
773. Stevenson v. Duke of Buccleuch, S. (Teinds), 137 (<i>Wilton</i>)	327, 328
774. Stevenson v. Carnegie, 1 M.P. 444 (<i>Forfar</i>)	317, 325
775. Stevenson v. Magistrates of Edinburgh, 17 D. 592 (<i>Edinburgh, St. George's and St. Luke's</i>)	63
776. Stevenson v. M'Nair, 7 R. 270 (<i>Edinburgh, Canongate and Old Kirk</i>)	53
777. Stewart, Petitioner, 25 S.L.R. 164 (<i>Peterhead</i>)	628
778. Stewart v. Brown, 13 D. 536 (<i>Innerkip</i>)	327
779. Stewart v. Earl of Fife, Mor. Stipend, App. 4 (<i>Turriff</i>)	317
780. Stewart v. Glenlyon, 13 D. 787 (<i>Blair-Atholl</i>)	327, 328, 467, 476, 490
781. Stewart v. Gorbals Kirk-Session, 2 S. 194, 564	607, 610
782. Stewart v. Presbytery of Paisley, 6 R. 178 (<i>Paisley</i>)	86, 87
783. Stiel v. Dalrymple, ¹ Mor. 5161, 7439 (<i>Heriot</i>)	497
784. Stirling Magistrates v. Gordon, 15 S. 657	298, 310
785. Stirling Presbytery v. Larbert Heritors, 4 F. 1048 (<i>Larbert, Dunipace</i>)	67, 68, 69
786. Stiven v. Heritors of Kirriemuir, 6 R. 174	158
787. Strang v. Steuart, 2 M.P. 1015 (<i>Livingston</i>)	432

¹ The cases respectively reported as Steel v. Dalrymple and Stiel v. Dalrymple are different stages of the same case.

	PAGE
788. Strathblane Heritors v. Glasgow Corporation, 1 F. 523, affd. 2 F. (H.L.) 25	111, 513
789. Strathblane Heritors v. Hamilton, 5 S. 913 377, 394, 398, 399, 401, 402, 403	
790. Strathmiglo Heritors v. Gillespie, Mor. 2491	624
791. Strathmiglo Minister v. Heritors, 1 Connell, Tithes, 417	314
792. Strathmore, Earl of, v. Rescobie Heritors, 15 R. 364	631
793. Swan v. Haliburton, 8 S. 637 (<i>Duddingston</i>)	218
794. Swinton and Simprim Union, Connell Par. 177	36, 212
795. Swinton v. Wedderburn, Mor. 8499 (<i>Ednam</i>)	103
796. Swinton v. Bishop of Edinburgh, 1 Br. Supp. 584 (<i>Crossmichael</i>)	277
797. Taylor v. Stewart, 2 Stuart, 538 (<i>Wilton</i>)	460, 480
798. Telfer v. Fulton, Hume, 192 (<i>Campbelton</i>)	169
799. Thom v. Dalrymple, 6 Paton, 737	529
800. Thomson v. Heritors of Dunfermline, Mor. 8504, 11,275 367, 412, 413	
801. Thomson v. Greenock Magistrates, 23 R. 405 (<i>Greenock, East Church</i>)	298, 316
802. Thomson v. Viscount Haddington, Mor. 14,783	279
803. Thomson v. Pollock, 11th November 1808, F.C. (<i>Gorbals, Glasgow, City</i>)	43
804. Tingwall Minister v. Heritors, Mor. 14,817, rev. 3 Paton, 140 289, 318	
805. Tingwall Minister v. Heritors, Mor. 7928	116, 130, 131, 132
806. Todd v. Sandison, 5 S.L.R. 496 (<i>Coldingham, Eyemouth</i>)	67, 68
807. Torphichen, Lord, v. ———, 5 Br. Supp. 753	446
808. Torphichen v. Gillon, Mor. 9936 (<i>Torphichen</i>)	155
809. Tough Case, Connell Par. 47 (<i>Tough, Monymusk</i>)	28
810. Trades House, Glasgow, v. Heritors of Govan, 14 R. 910	512, 541
811. Traill v. Dangerfield, 8 M'P. 579 (<i>Lady</i>)	265, 339, 611
812. Traquair v. Heritors of Innerleithen, 9 M'P. 234 112, 513, 540, 541	
813. Turnbull v. M'Laws, Mor. 8013 (<i>Kippen</i>)	215
814. Turner v. Lord Borthwick, 1 Br. Supp. 639 (<i>Borthwick</i>)	303
815. Turner v. Greenock Magistrates, Mor. 10,980	339
816. Turner v. M'Kenzie, 7 M'P. 538 (<i>Greenock</i>)	188, 189
817. Tweeddale, Marquis of, v. Dunfermline Kirk-Session, 5 Br. Supp. 600	611
818. Ure v. Carnegie, Mor. 7929 (<i>Forfar</i>)	13, 149, 538
819. Ure v. Ramsay, 6 S. 916 (<i>Tillicoultry</i>)	149, 152, 156, 161, 173, 175, 185, 187, 188, 191, 195, 197, 198, 199, 202, 207, 209, 564
820. Urquhart v. Officers of State, Mor. 9915, affd. 9923 (<i>Cromarty</i>)	81
821. Veitch v. Wedderlie, Mor. 10,640 (<i>Westruther</i>)	266
822. Vernor v. Allan, Mor. 14,788	293
823. Walker v. Presbytery of Arbroath, 3 R. 498, affd. 4 R. (H.L.) 1 (<i>Arbroath</i>)	175, 179, 181, 521, 564, 565, 588
824. Walker v. Zetland, 10 D. 1378 (<i>Polmont</i>)	152, 153, 154, 157, 159
825. Wardlaw Case, Connell, Tithes, vol. i. p. 119	619
826. Watson v. Law, Mor. 16,588	423, 489, 509
827. Watson v. Watson, Mor. 5431, 7917 (<i>Dundee, E. Kirk</i>)	167, 169
828. Weatherstone v. Tweeddale, 12 S. 1 (<i>Channelkirk</i>)	294
829. Wedderburn v. Durie, Mor. 7971	236
830. Wemyss v. Lasswade Parishioners, Mor. 462	303, 305

	PAGE
831. Wemyss v. Morton, 12 S. 332 (<i>Aberdour</i>) . . .	158, 159
832. White v. Kinglassie Kirk-Session, 5 M'P. 869 . . .	600
833. White v. Symington Parishioners, Mor. 15,893 . . .	302
834. Whitelaw, Petitioner, 3 R. 88 (<i>Flowerhill, New Monkland, Airdrie</i>)	56
835. Whitsome and Hilton Union, Connell Par. 157 . . .	32, 34
836. Whitton v. Lord Wharnccliffe, 1869, unreported (<i>Newtyle</i>) . . .	531
837. Whyte v. Heritors of Fettercairn, 13 D. 238 . . .	324
838. Wigton v. Gray, Mor. 10,998-9 (<i>Drummelzier</i>) . . .	260
839. Wigtown Case, 1 Connell, Tithes, 119 . . .	619
840. Wilkie v. Cults Heritors, Mor. 2493 . . .	625, 626
841. Wilkie v. Simpson, 2 Paton, 222 (<i>Foulden</i>) . . .	491, 502
842. Williamson v. Kirkcaldy Parishioners, Mor. 7914 . . .	105, 106, 107, 114
843. Williamson v. Mercer, 2 Hailes, 1062 (<i>Lethendy</i>) . . .	465
844. Williamson v. Ramsay, Mor. 5121 (<i>Kirkcaldy, Abbotshall</i>)	28, 426, 493, 507
845. Wilson v. Agnew, 9 S. 357 (<i>Stranraer</i>) . . .	433
846. Wilson v. Brown, 21 D. 1060 (<i>Muckhart</i>) . . .	194, 198, 199, 209, 215
847. Wilson v. Forbes' Trustees, 10th June 1818, F.C., rev. 1 S. App. 249 (<i>Falkirk</i>) . . .	446, 490, 499
848. Wilson v. Officers of State, S. (Teinds), 88, (<i>Stranraer</i>) . . .	300, 433
849. Wilson v. Ogilvie, Connell Par. Supp. 63 (<i>Falkirk</i>) . . .	137
850. Wilson v. Stranraer Presbytery, 4 D. 1294 (<i>Stranraer</i>) . . .	6, 553
851. Wilton Minister, Petitioner, 5 S.L.R. 631 . . .	483
852. Winton v. Archbishop of Glasgow, Mor. 15,733 (<i>Kirkliston</i>) . . .	231
853. Woodrow v. Cunningham, Mor. 8503 (<i>Tarbolton</i>) . . .	382
854. Wright v. Binning, Mor. 14,833 (<i>Maybole</i>) . . .	295
855. Wright v. Elphinstone, 8 R. 1025 (<i>Tulliallan</i>)	145, 173, 185, 189, 191, 201, 202, 203, 205, 208, 210, 212
856. Wright v. Kennedy, Mor. 14,837, foot-note . . .	347
857. Wright v. Wright, 9 R. 15 (<i>New Machar</i>) . . .	187
858. Yell and Fetlar Union, Connell Par. 63 . . .	46

LIST OF PARISHES.

(The number refers to the number of the Cases in the immediately preceding List of Cases.)

Abbotrule	267	Ballingry	545, 656
Abbotshall	4, 844	Balmerino	129
Abdie	5, 30	Banchory	61
Aberdour	13, 289, 831	Banchory-Devenick	631
Aberfoyle	217	Banchory-Ternan	62
Aberlady	265	Barnwell	143
Aberlemno	691	Barony, Glasgow 15, 55, 116, 132,	
Aberscherder	14		686, 697
Airdrie	834	Barr	546
Alva	426	Barry	64, 608, 744
Alloway	47, 48	Barvas	483, 593
Ancrum	731	Bassendean	66
Annan	201, 210	Bathgate	418, 484
Anstruther	166	Beith	68, 102, 685
Anstruther Wester	104	Belhaven	650
Anwoth	531	Bellie	70, 71
Arbirlot	37	Berriedale	581
Arbroath 38, 39, 282, 627, 823		Blair-Atholl	683, 780
Arbuthnot	40, 329	Blairgowrie	83
Ardoch	693	Boharm	703
Ardrossan	25, 41	Bo'ness	86, 309
Ardersier	145	Bonhill	740, 741, 759
Arngask	378, 379	Borgne	294
Arrochar	283	Borthwick	88, 814
Auldcathy	395	Bothwell	126, 361
Auchendoir	292	Botriphnie	92
Auchterarder 44, 452, 453, 454		Bowton	94
Auchterderran	656	Brechin 139, 523, 590, 643, 644, 645	
Auchtergaven 45, 153, 161, 628		Broughton	99
Auchterhouse	46	Brydekirk	106
Auchtermuchty	388	Buckie	296
Auchtertool	82	Buittle	114
Avondale	365	Buncle	238
Ayr	47, 48, 575	Cadder	118, 133, 178, 500
Ayton	172, 392, 612	Caerlaverock	589
Balfron	60	Cairney	120, 121, 244

Callander	576	Cummertrees	519
Campbelton	42, 798	Cupar	16, 160, 415, 583
Cambuslang	359	Currie	147, 184
Cambusnethan	401, 494, 495, 496, 497	Dalgety	558
Cardine	424	Dalmeny	187, 395, 698, 700
Cardross	411	Dalreoch	411
Cargill	135	Dalry	753
Carlaverock	77	Dalton	190
Carmichael	609, 610	Dalzell	360
Carmunnock	137, 646	Denny	275
Carmyllie	138, 408	Dipple	200
Carnbee	36, 421, 562	Dirleton	61
Carsphairn	140	Dollar	203, 353
Carstairs	78, 141	Dolphinton	204
Carnwath	73	Dornock	520
Catrine	52	Douglas	207
Cathcart	137 208, 352, 529, 574, 646	Drummelzier	838
Ceres	393	Drymen	214
Channelkirk	739, 828	Duddingston	6, 215, 552, 718, 793
Chanonry	300	Duffus	223
Chesters	267	Dumbonan	450
Chirnside	475	Dumfries	218, 219, 527
Cluny	449, 626	Dunbar	111, 134, 220, 224, 650
Cockburnspath	162, 766	Dundee	119, 149, 229, 230, 231, 232, 246, 827
Coldingham	151, 205, 690, 806	Dundonald	413
Colinton	683	Dundurcus	703
Colliston	389	Dunfermline	75, 233, 234, 235, 242, 273, 303, 602, 800, 817
Corstorphine	683, 722	Dunipace	236, 785
Coull	10	Dunkeld	237, 524
Coupar-Angus	383, 727	Dunnichen	195, 408
Coylton	146	Dunning	239
Crailling	100	Dunoon	123
Cramond	171	Duns	240, 341, 375
Cranston	188	Dunsyre	241
Crawford	751	Durisdier	459
Craighall	394	Durness	243
Creich	344	Duthil	53, 54
Crichton	76	Dysart	29, 245, 614
Crieff	175, 181, 212	Eaglesham	109
Cromarty	820	East Calder	464
Cromdale	222	Eastwood	247, 528
Crossmichael	796	Eccles	17, 522
Cullen	177	Eckford	248
Culross	158, 159, 179	Eddleston	249
Culsalmond	540	Edgerston	707
Culter	99	Edinburgh—	
Cults	298, 840	Canongate	566, 701, 776
Cumbernauld	275	Gaelic	761

Lady Glenorchy's	254	Glasgow—	
Old Kirk	566, 776	Barony 15, 55, 116, 132, 686, 697	
St. Andrew's	714	City	15, 116, 373, 803
St. Cuthbert's	31, 252, 419, 476, 621, 683, 770	Kelvinhaugh	55
St. George's	775	St. George's	132
St. Giles'	251	Tron	322
St. John's	472	Glassford	213
St. Luke's	775	Glenbucket	724
St. Margaret's	598	Glenholm	99
Tolbooth	154	Glenluce	306
Tron	387, 508, 509	Glenmuick	325, 478
Ednam	257, 795	Gorbals 330, 579, 601, 674, 781, 803	
Edrachilles	243, 684	Gordon	66
Edzell	258	Govan	352, 649, 810
Elgin 216, 260, 261, 262, 263, 264, 406, 572, 595, 772		Greenock	144, 347, 815, 816
Elie	35	East Church	801
Errol	446	Mid Church	346
Eskdalemuir	271	New Church	345
Essill	200	Haddington	84, 355
Etrick	272, 563	Half-Morton	532
Eyemouth	393, 754, 806	Hamilton	362
Falkirk 274, 275, 551, 665, 733, 847, 849		Harray and Birsay	422, 479
Falkland	276, 277, 278	Hassendean	107, 108, 569
Farnwell	447	Hawick	611
Fearn	281, 372	Haymouth	205
Fenwick	294	Heriot	769, 783
Ferry-Port-on-Craig	113	Hettam	58
Fetlar	858	Hilton	835
Fettercairn	837	Hobkirk	267
Flowerhill	834	Hoddam	106, 169
Fogo	397	Holywood	518
Forbes	292, 295	Houndwood	151
Forfar	774, 818	Huntly	450
Forgandenny	297, 723	Hurlford	110
Forteviot	63	Hutton	390
Forth	299	Inch	191, 286, 399, 404
Fortingall	577	Inchture	448
Fortrose	300	Innerkip	778
Foulden	841	Innerleithen	812
Fraserburgh	304, 548	Inverarity and Meathie	93, 534
Fyvie	56	Inveraray	407
Galashiels	326, 328	Inveresk	69, 748
Galston	758	Inverkeillor	408
Gamrie	14	Inverkeithing	409, 706
Gaston	314	Inverness	588
Girvan	405	Gaelic	582
Gladsmuir	84	Inverury	410
		Irvine	307, 413, 414
		Jedburgh 228, 321, 391, 416, 417, 707	
		Jura and Colonsay	516

Kearn	292	Kirkliston	852, 386, 462
Keithhall	445	Kirkmichael	463
Kelton	167, 218, 527	Kirknewton	164, 385, 464, 465
Kelvinhaugh	55	Kirkpatrick Durham	287
Kettins	427	Kirkpatrick Easter	226
Kilberry	124, 605	Kirkton	266
Kilbrandon	486	Kirkwall	28, 49
Kilbride	25, 320	Kirriemuir	466, 630, 786
Kilbucko	99	Ladhope	148
Kilcalmonell and Kilberry	124, 605	Lady	811
Kilconquhar	35, 74	Lamington	547
Killalain	664	Lanark	196, 471, 501
Killieudden	463	Larbert and Dunipace	236, 785
Kilmadock	429	Largs	308
Kilmalcolm	280, 430, 431, 668	Lasswade	620, 716, 830
Kilmarnock,	110, 432	Lauder	473
Kilmarnoch,	740	Leadhills	751
Kilmonivaig	578	Leith—	
Kilmorack	122, 152, 506	North	315, 419, 624, 688
Kilmuir	749	South	573, 721, 762
Kilrenny	35, 433	St. John's	253
Kilsyth	434	Lerwick	128, 536
Kiltarlity	51	Leslie	710
Kilwinning	211, 284, 435	Leswald	480
Kincardine O'Neil	332, 436	Lethendy	155, 156, 537, 538, 843
Kincarth	285	Lethnot	481
Kinclaven	382	Liff and Benvie,	485
Kinfauns	18, 81	Lilliesleaf	165
Kinghorn	441, 745	Linlithgow	33, 202, 370, 487, 488
Kinglassie	832	Linton	358, 490, 615
Kingoldrum	356, 408, 442, 742	Little Dunkeld	493
Kingsbarns	443, 444	Livingston	787
Kinkell	445	Lochcarron	318, 592
Kinloch-Rannoch	577	Lochlee	186, 481, 498, 499
Kinlochspelve	340	Lochmaben	676, 771
Kinnerny	449	Lochs	125, 483
Kinnore	450	Logie	503, 504, 505
Kinnoull	342, 357, 455, 456	Luss	740
Kinross	105, 457	Madderty	512, 513
Kintore	445	Mains and Strathmartin	515
Kippen	669, 670, 813	Makerstoun	354
Kirkanders	294	Mancla	150
Kirkbean,	130	Manor	206
Kirkbryde	459	Markinch	470
Kirkcaldy		Maryhill	636, 686
4, 24, 90, 521, 639, 842, 844		Mauchline	89, 91
Kirkconnell	459, 677	Maybole	854
Kirkcudbright	218, 460, 461, 527, 570	Meathie	534
Kirkden	542	Melrose	492, 673
Kirkintilloch	323, 567	Methven	305, 511

LIST OF PARISHES.

719

Midcalder	539	Penninghame	96
Middleby	675	Peterhead	371, 177
Midmar	449, 629	Petty	755
Moffat	336	Pitsligo	194, 660
Moneydie	212, 667	Polmont	57, 665, 824
Monkquhitter	333	Port	666
Montrose 543, 553, 554, 555, 556, 622		Portree	749
Monymusk	809	Prestonpans	384, 671, 756, 757
Monzie	212	Queensferry	571
Moonzie	324	Rathan	12, 659
Morebattle	559	Rathven	313
Morham	560, 561	Ratray	451, 682
Morumside	425	Redgorton	18, 491, 510
Muckarsie	564	Renfrew	599
Muckhart	565, 846	Rescobie	691, 792
Muirkirk	712	Riccarton	110
Neilston	541, 616, 764	Roberton and Wiston	695, 734
Nesting	103, 227	Rosemarkie	300
New Aberdour	198, 199, 312	Rosskeen	604
Newburn	474	Rosyth	706
New Cumnock	502	Rothies	703
New Deer	142	Rothsay	600, 704, 711
Newhills	26	Rothiemay	705
Newlands	197	Rothiemurchus	53
New Machar	439, 743, 857	Row	163, 290, 291
New Monkland	834	Rutherglen	101, 279
Newton	617	Ruthven	296
Newton-on-Ayr	679	Saddel	717
Newtyle	836	St. Andrews . 59, 112, 713, 715, 736	
North Berwick	623	St. Leonard's	619, 635
North Bute	117	St. Bothan's	750
North Leith	315, 419, 624, 688	St. Cuthbert's (Edinburgh)	31, 252,
Novar	481		419, 476, 621, 683, 770
Oban (St. Columba's)	580	St. Leonard's (St. Andrews),	619, 635
Old Cambus	766	St. Madoes	423
Old Deer	168, 632	St. Mungo's	34
Oldhamstocks	72, 316	St. Ninian's	696, 719
Old Machar	440, 633	Sanquhar	459
Old Meldrum	634	Sauchenford	719
Old Monkland	663, 760	Selait	594
Olrig	637	Scone	18, 521
Ordiequhill	334	Scoonie	720
Orwell	80, 638, 694	Selkirk	729, 730
Oxnam	398	Shettleston	737
Paisley . 98, 606, 609, 640, 651, 782		Simprim	794
Panbride	641, 642	Skene	746, 747
Partick	649	Slamannan	21, 22, 275, 584
Peebles	185, 469, 652, 653, 654	Sleat	749
Pencaitland	655	Small Isles	749
Penicuik	209, 403	Snizort	749

Southend	127	Tingwall	804, 805
South Leith	573, 721, 762	Tinwald	348
Southwick	763	Tongue	243
Stair	768	Torphichen	808
Stewarton	180, 183	Tough	809
Stirling	20, 709, 784	Troqueer	350
Stoneykirk	174	Tulliallan	855
Store	335	Tullynessle	292
Stornoway	483, 591	Turriff	779
Stow	193	Tweedsmuir	568
Strabrock	420	Uig	483
Stranraer	607, 845, 848, 850	Urquhart and Glenmorrison	692, 752
Strath	749	Walls and Flotta	97, 625
Strathaven	366	Walstoun	489
Strathblane	256, 557, 788, 789	Wardlaw	825
Strathdon	331	West Calder	351, 477, 738
Strathmiglo	278, 790, 791	Westruther	821
Strichen	302	Whithorn	618
Stronsay and Eday	32	Whitsome	835
Swinton	754, 794	Wick	221
Symington	136, 293, 833	Wigtown	839
Tarbolton	648, 853	Wilton	773, 797, 851
Tealing	259	Wishaw	401
Terregh	658	Yarrow	728
Tillicoultry	517, 819	Yell and Fetlar	858

GENERAL INDEX.

	PAGE
Abbots' Lands,	439
Accommodation—	
In new Church,	132, 135, 137
Act of Parliament. <i>See Statute.</i>	
Act of Sederunt, 4th March 1840,	338
Adherents—	
Vote in Election,	85
Admission. <i>See Induction.</i>	
Alienation of Benefices,	231
Alimentary—	
How far Stipend is,	348
Allocation. <i>See Churchyard, Seats in Church.</i>	
Allodial—	
Tenure of Manse and Glebe,	364, 462
Alterations of Parishes,	15, 16
Ann,	303
Amount,	305
History,	303-4
Parliamentary Church,	307
To whom due,	304
Under Small Stipends Acts,	306
When due,	306
Annexation, Parochial—	
Consent of Heritors,	41
Effect as regards Burdens,	39, 41
Parties interested,	40
Presumed to be <i>quoad omnia</i> ,	40
<i>Quoad sacra</i> only,	28, 41, 44
Assessments,	546
Effects as regards Burdens,	114
What it involves,	39
Annexation Act, 1587, c. 29,	237
Annuity Tax,	298
Appeal—	
To Sheriff,	583, 584
To Lord Ordinary,	587
Finality,	587, 588
Intimation,	585, 588
Remit to man of skill,	587, 589
Appointment of Minister,	84
Abortive,	87
Disputed,	86, 87
Extension of time,	87
Jurisdiction,	86

Arable. See *Glebe, Minister's Grass.*

Area. See *Seats in Church.*

Assessment. See *Heritors' Assessments.*

Decree by Presbytery, 581-2

Assistant and Successor—

Admission, 96

Appointment, 85, 96

Augmentation, 325

Assumption of Thirds, 275

Augmentation of Stipend, 314

Assistant and Successor, 325

Burgh Church, 316

Citation of Presbytery, 321

Collegiate Charge, 315

Collusive, 345

Common Agent, 294

Conversion of Victual Stipend, 321

Date from which runs, 319

Death of Defender, 321

Fiars Prices, 332

Free Teind, 314

Glebe, extent of as factor, 326

Grounds for granting, 323

Interest, 347

Interim Locality, 330

Locality, 329

Mode of demanding, 318

Modified in Victual, 331

Presbytery, 321

Procedure, 318

Procedure after obtained, 328

Re-augmentation, 288, 318

Retrospective effect, 346

Right indefeasible, 317

Service, 320

Summons, 318

Title to sue, 316

Voluntary addition to Benefice, 328

Wakening, 321

What Ministers entitled to demand, 315

When competent, 314

When existence of free Teind denied, 322

Bankruptcy—

Of Minister, 349

Banns of Marriage, 632

Dues, 616, 617, 631

Baptismal Register, 616

Baptismal Vessels, &c. 137, 139, 626, 627

Barony, Burgh of, 9

Beadle—

Appointment of, 607

Doorkeeper, 607

Duties, 607

Minister's Man, 606

Salary, 609

	PAGE
Beadle — <i>continued</i> .	
Session Officer,	606
Threefold Office,	607
Belhaven Act ,	350
Bell ,	137, 139, 140
Benefice —	
Bishop's,	237
Dilapidation,	231
Minister's duty to protect,	242
Nature of Minister's right,	243
Of Cure,	74
Patronate,	74
Plurality,	248
Rates,	250
Spirituality,	230
Tacks,	232
Taxation,	250
Temporality,	230, 239
When Minister's right emerges,	246
When Minister's right ceases,	248
Benefices, Erected ,	17
Bishops —	
Benefices,	237
Jurisdiction of, in regard to Churches and Manse,	559 <i>et seq.</i>
Power to alter Parishes,	6
Pre-Reformation and Church building,	102
Bishops' and Friars' Lands ,	439
Bona fide Consumption —	
Of Stipend,	100
Books of Discipline ,	75
Borrowing —	
Against Assessments,	549
Borrowstoun. See <i>Burrowstoun</i> .	
Bottom Room. See <i>Seats in Church</i> .	
Burgh —	
Of Barony,	9
Of Regality,	9
Royal—	9
Constitution of,	8
Lands held feu by,	12
Rural area within,	15
Stent Roll,	12
Burghal Parish ,	7, 8
Allocation of Church Seats,	166
Augmentation,	316
Glebe,	424
Heritors,	516
Maintenance of Church,	164
Manse not provided,	359, 363, 366
Seat-letting,	166
Stipends,	297
Burghal Districts —	
Erection of <i>quoad sacra</i> ,	64
Burghal-Landward. See <i>Landward-Burghal</i> .	
Burghal Tenure ,	13

	PAGE
Burial. See <i>Churchyard.</i>	
Among Romans,	170
Christian,	171
In Churches,	171, 172, 213
Prescriptive right,	220
Burial Dues,	215
Burial-Ground. See <i>Churchyard.</i>	
Closing of,	222
Private,	218
Provision of,	224
Public Cemetery,	216
Transference to Parish Council,	216
Burial-Grounds (Scotland) Act, 1855,	221
Authority under,	222
Closing of Burial-Ground,	222
Provision of new Ground,	224
Burrow Acres,	10
Burrowfield,	10, 15
Burrowmuir,	10
Burrow Roods,	10
Burrowstoun Kirk,	10
No Manse,	359, 363, 366
Call,	93
Canon Law—	
Constitution of Parishes under,	2
Induction under,	90
Patronage,	73, 81
Rule in regard to providing Churches,	101
Casting Vote,	528
Cemeteries,	216
Cenotaphs,	203, 218
Cess,	11
Cess-Books,	12
Cessio,	349
Chairman. See <i>Heritors' Meetings.</i>	
Chancel—	
Maintenance of,	106
Chapel Ministers,	553
Charge—	
For payment of Stipend,	336
Charles I.—	
Teind proceedings by,	283
Christian Burial,	171
Church—	
Accommodation to be provided,	132, 135, 137
Allocation. See <i>Seats in Church.</i>	
Appeal from Presbytery,	131
Area. See <i>Allocation.</i>	
Act of 1572,	105, 115, 116
Act of Privy Council of 1563,	104
Bell,	137, 139, 140
Bishops Pre-Reformation, and Repairs,	102
Bottom Room. See <i>Seats in Church.</i>	
Burghal. See <i>Burghal.</i>	
Burghal-Landward. See <i>Landward-Burghal.</i>	

Church—*continued.*

PAGE

Burial in,	171, 172, 213
Chancel,	106
Collections. See <i>Church-Door Collections.</i>	
Control of Divine Worship,	147
Custody,	147, 608
Dedication,	141
Designation. See <i>Designation.</i>	
Doorkeeper,	607
Enlarging,	123
Examinable persons,	133, 135
Exceptional use of,	146
See <i>Use, infra.</i>	
<i>Extra Communion,</i>	142
Heritors. See <i>Heritors.</i>	
How building impressed with character of Parish Church	141
How obligation to maintain enforced,	115, 116
Inadequacy of size not ground for rebuilding,	126, 128
Keys,	608
Kirk-Session as guardians,	147
Liability to maintain—	
Not dependent on occupancy,	114
Where lands disjoined <i>quoad sacra</i> ,	114
Where parish <i>quoad sacra</i> erected,	115
Magistrates—	
As Guardians,	148
See <i>Magistrates.</i>	
Meetings in,	144
Minister—As Custodian,	147
See <i>Minister.</i>	
New Site,	136
New, size of,	132
Obligation—	
To build,	108 <i>et seq.</i>
To maintain,	111, 113
Officers,	606
Parliamentary. See <i>Parliamentary.</i>	
Parson's former liability,	104-108
Parts and pertinents,	137
Permanent character of obligations,	113
Pews. See <i>Seats in Church.</i>	
Plans,	129, 131
Pre-Reformation Bishops, and Repairs,	102
Presbytery. See <i>Presbytery.</i>	
Privy Council Act of 1563,	104, 115, 116
Provision of—	
By Commissions,	109
In Parishes <i>quoad sacra</i> ,	110
Prior to Reformation,	101
Where none before,	110
Public Burden,	113
Rebuilding—	
When necessary,	118 <i>et seq.</i> , 125 <i>et seq.</i>
Procedure,	576
Repairable,	118 <i>et seq.</i> , 125 <i>et seq.</i>

	PAGE
Church — <i>continued.</i>	
Repairs, when required,	117
Procedure,	574
Right in Area and Pews,	158, 159
Sacramental Furniture,	137, 139
Seats. See <i>Seats in Church.</i>	
Site of new,	136, 562
Sittings. See <i>Seats in Church.</i>	
Size of new,	132
Standard of comfort,	117, 136, 138
Statutes passed at Reformation,	104
Steeple,	140
Teinds, once burdened,	102, 104, 107
Titular, not liable to uphold,	112
Transportation,	136, 631
United Parish,	35, 36
Use of—	
Exceptional,	146
Lawful,	143
By Dissenters,	145
Vestry,	605
Vindication of Title,	558
Church Courts. See <i>Presbytery, Kirk-Session.</i>	
Appointment of Minister,	86
Jurisdiction as regards Induction and Ordination,	98, 99
Church-Door Collections,	595
In Parishes <i>quoad sacra</i> ,	599
Special,	597, 599
Church Lands. See <i>Glebe, Minister's Grass.</i>	
Crown Grants,	235
Church of Scotland Courts Act, 1863,	250, 651
Church Patronage (Scotland) Act, 1874,	84, 669
Churchmen—	
Possessory Rights,	252
Church Officers,	606
Churchyard—	
Abandoned,	205, 211
Actions in Sheriff Court,	191
Allocation of,	182
Allocation of Lairs,	193
Allottee's right in Ground,	200
Amount, situation, and character of Ground,	176
Becoming use of,	187, 188, 190, 201, 208
Burghal-Landward. See <i>Landward-Burghal.</i>	
Burial, Right of,	182
Burial Dues,	215
Burial-Grounds (Scotland) Act, 1855,	221, 642
Cenotaphs,	203
Closing of,	222
Defenders to be called,	192
Definition of,	173
Desecration,	187, 189, 201, 208
Designation. See <i>Designation.</i>	
Dissenting Chapel in,	201, 208
Disturbance of Grave,	193

Churchyard—*continued.*

Disused,	205, 211
Dykes,	186
Encroachment on Graves,	188
Enlargement,	199
Excambion,	210
Grass, right to, in,	207
Improper occupation of,	187, 188, 190, 201, 208
Heritors. See <i>Heritors.</i>	
Kirk-Session,	199
Landward-Burghal Parish. See <i>Landward-Burghal.</i>	
Magistrates,	185
Maintenance,	186
Management,	184, 185
Minerals,	206
Mortcloths,	215
Not subjects of commerce,	207
Obligation to provide,	172
Origin of,	172
Parties to actions,	192
Pasturing in,	189
Personal right, vindication of,	191
Possession of Ground in,	201
Presbytery. See <i>Designation.</i>	
Presbytery's guardianship,	186
Property, right of, in,	203
Re-allocation of Graves,	197
Re-use of old Grave,	193
Right of Burial,	182
Right in Ground allocated,	209
Right of Property in,	203
Sale of,	208
Sale of Ground in,	209
Situation of,	176
Superior and burial right,	183
Teind Court,	212
Title to,	204
Title and right of Burial,	183
Tombstones,	187, 201
Transfer at Reformation,	173
Transfer to Parish Council,	216
Transportation of,	210
Trees in,	207
Union of Parishes,	35, 212
Vindication of personal right,	191
Citation —	
Of Presbytery,	552
Of Heritors by Presbytery,	565
Classification —	
Of Parishes,	7
Clerk. See <i>Heritors, Session, Presbytery.</i>	
Collation,	74, 90-92, 96
Collections. See <i>Church-Door Collections.</i>	
Collector of Assessments,	548
Collegiate Charge,	249
Augmentation,	315, 345

	PAGE
Collegiate Charge—continued.	
Election of Minister,	85
Glebe,	426, 427
Manse,	370
Stipend to Second Minister,	290
Commission—	
Of Plat,	277, 279
Of 1606,	17, 279
Of 1617,	19, 108, 279, 281
Of 1621,	19, 282
Of 1627,	21, 283
Of 1633,	21, 283
Of 1641,	21
Of 1641 to 1693,	22, 285
Of 1661,	109
Of 1707,	24-29, 286
On erected Benefices,	17, 279
On Parishes,	5
Powers of earlier,	23
Provision of Churches by,	109
To Court of Session,	24, 286
Commissioners of Supply,	11, 629
Committee—	
Congregational,	84
Of Heritors,	534, 548
Common Agent,	294
Common Church,	74
Communicants—	
Vote in Election of Minister,	85
Communion Elements,	618
Act 1572, c. 54,	618
Act 1617, c. 3,	618, 619
Act 1633, c. 19,	619, 620
Act 1641, c. 39,	619
Act 1661, c. 61,	620
Act 1707, c. 9,	620
Amount of allowance,	620
Application of allowance,	624
Introduction of allowance,	618
Modification of allowance,	618
Object of provision,	623
Parson's liability,	618
Source of allowance,	625
Teinds,	625
Teind Court,	626
Communion Roll,	85
Communion Vessels,	626, 627
Company—	
Incorporate, as Heritor,	513
Congregation—	
Definition of,	85
Congregational Committee,	84
Consent—	
To Disjunction and Erection,	45, 47
To Disjunction and Annexation,	41

	PAGE
Consent — <i>continued.</i>	
To Union,	26, 32
<i>See Glebe, Heritors, Presbytery.</i>	
Constitution —	
Of Church <i>quoad sacra</i> ,	59, 630
Of Parish by Canon Law,	2
Contract —	
Authorised by Court,	590
By Presbytery,	580
Court of Session —	
Made Teind Commission,	24, 286
Crown —	
Alteration of Parishes by,	6, 16
Curator ,	521, 527
Custody of Church ,	147, 608
Decennalis et triennalis possessio —	
Canon Law,	252
Layman,	264
Manse Rent,	264
Salmon Fishing,	264
Scottish Law,	255
Vicarage Teind,	264
Decimæ debentur parochio ,	274
Decreet-Arbitral —	
Of Charles I.	284
Derelinquishment ,	339
Deseccration —	
Of Churchyards,	187, 189, 201, 208
Designation ,	563
Of Churchyard,	175, 179, 180, 564
Constructive,	181
Church site,	562, 563
Enforcement of Decree,	569
Entailed lands,	570
Glebe. <i>See Glebe.</i>	
Manse,	409, 563
Minister's Grass. <i>See Minister's Grass.</i>	
Dilapidation of Benefices ,	231
Diligence —	
Attaching Stipend,	348
Diocese —	
Originally equivalent of Parish,	1
Disjunction and Annexation. <i>See Annexation.</i>	
Disjunction and Erection. <i>See Erection.</i>	
Dissenters —	
Use of Church by,	145
Dissenting Chapel —	
In Churchyard,	201, 208
Dominican Lands ,	445
Doorkeeper ,	607, 609
Dues ,	604, 609, 611, 616, 631
Dykes —	
Of Churchyards,	186
Edinburgh Churches ,	168, 298
Elders ,	551

	PAGE
Elders—continued.	
Appointment of,	592
Of Parishes <i>quoad sacra</i> ,	556
Pew,	155
Election of Minister,	84
Abortive,	87
Disputed,	86, 87
Extension of time,	87
Induction without,	97
Jurisdiction,	86
Regulations by General Assembly,	678
Electoral Roll of Congregation,	85
Ecclesiastical Assessments (Scotland) Act, 1900,	545, 674
Ecclesiastical Buildings and Glebes (Scotland) Act, 1868,	517, 541, 662
Ecclesiastical Charities,	602
Endowments—	
Of Parish <i>quoad sacra</i> ,	296
Entailed Lands—	
Designation,	570
Erection <i>quoad sacra</i> ,	56, 57
Episcopacy—	
History of,	236-8
Erected Benefices,	17, 279
Erection quoad omnia—	
Prior to 1617,	16
By Parliamentary Commissions, 1617-1707,	18
Under 1707, c. 9,	26
Under 7 and 8 Vict. c. 44,	44
Consent of Heritors,	45, 47
Effect of Decree,	51
Objections to Decree,	50
Parties interested,	38, 46
Poor Law,	51
Procedure,	46
When district already a Parish <i>quoad sacra</i> ,	51
When district has a Parliamentary Church,	64
What erection involves,	37
Erection quoad sacra—	
Before 1844,	27
Under 7 and 8 Vict. c. 44,	53
Assessments,	115, 547
Of Burghal area,	64
Of Gaelic Churches,	60
Of Parliamentary Districts,	61
Of United Parishes,	64
Procedure,	54
When competent,	53
Examinable Persons,	133, 135
Excambion—	
Churchyard,	210
Glebe. See <i>Glebe</i> .	
Exchequer Livings,	297, 299
Expenses—	
Of Heritors,	534

	PAGE
Expenses — <i>continued.</i>	
Of Presbytery,	591
Extracts —	
From Kirk-Session Records,	614
Family Pew,	152
Female Heritor,	516
Feuing. See <i>Glebe.</i>	
Fiars Prices,	332
Free Manse. See <i>Manse.</i>	
Free Teind,	314
When its existence denied,	322
Gaelic Churches,	60
Garden Wall —	
Of Manse,	376
General Assembly —	
Regulations for Election of Ministers,	85, 678
Glebe —	
Abbots' Lands,	439
Access to,	429
Act. See <i>Statute.</i>	
Allodial character of,	462
Apportionment of Rent,	460-1
Arable character of ground,	427, 431
Augmentation, whether value an element,	326
Bad quality of Glebe,	453, 466
Bishops' and Friars' Lands,	439
Burghal Parish,	424
Casualties,	485, 486
Church Lands—	
Abbots' Lands,	439
Bishops' and Friars' Lands,	439
Designation out of,	419, 421, 436, 437
Dominicans' Lands,	445
Hospital and College Lands,	444, 445
Order of liability,	439
Parsons' and Vicars' Lands,	439, 447
Relief among Heritors,	451
St. John's Lands,	446
Superiorities,	445
Temple Lands,	446
What are,	443
Coal,	477
Collegiate Charge,	426, 427
Commissionership of Supply,	628
Compensation for want of,	466, 474
Crop grown by predecessor,	457
Cultivation of,	478
Deficiency of extent,	453
Designation,	464, 567
Effect of, <i>quoad</i> extent,	471
Exemption from,	447
How proved,	464
Order of liability,	437
Procedure,	567
Relief among Heritors,	449

	PAGE
Glebe — <i>continued</i> .	
Review of,	454
Warrandice against,	452
Dominican Lands,	445
Enclosed Lands,	441, 449
Enclosure of,	428
Excambion,	467, 571
Heritors' consent,	468
Presbytery's consent,	467, 468, 571
Under Act of 1649,	422
Extent of,	428, 453, 471
Fencing,	428
Feuing of,	479 <i>et seq.</i>
Casualties,	485, 486
Consents,	481, 628
Expenses of procedure,	485
Feu-duty,	482, 484
Model Deed,	483
Pre-emption,	483, 628
Procedure,	482
Prohibition after Reformation,	416
Roads,	485
Title granted,	486
Glebe Lands (Scotland) Act, 1866,	479, 517, 653
Grass Glebe,	418, 421, 429, 434
Cultivation of,	478
Not to be confounded with Minister's Grass,	429, note
Situation of,	443, 444
Sout,	430
Heritors—	
Consent to Feuing,	481, 628
Excambion,	468
Lease,	480
Liability,	437
Pre-emption,	483, 628
Relief among,	449
Hospital and College Lands,	444, 445
Incorporate Acres,	422, 447
Infertment,	463
Lands exempt,	447
Landward-Burghal Parish,	426
Lease,	479 <i>et seq.</i>
Marl,	477
Measuring of,	453
<i>Messis sementem sequitur</i> ,	457
Minerals,	477
Minister—	
Entitled to Glebe,	424
Interest on designation,	452
Nature of his right,	476
Right to enter into possession,	246, 454
Title,	461
Mortification,	433
Nature of the provision,	433
Order of liability to designation,	437

Glebe—*continued*.

PAGE

Parsons' and Vicars' Lands,	439, 447
Peats,	477
Pre-emption,	483
Presbytery—	
Designation by,	464, 567
Excambion,	468, 571
Feuing,	481
Jurisdiction,	421, 466, 473, 474
Lease,	480
Prescription,	463, 465
Provision of, prior to 1644,	416
Proximity to Church and Manse,	417, 418, 422, 441, 443, 454, 466
Purchase Money, investment of,	628
Rates,	251
Relief among Heritors,	436, 449
Removing,	247, 455
Rent, apportionment of,	461
St. John's Lands,	446
Salmon Fishing,	473
Servitude,	472
Sale of,	481
Small Stipends Acts,	435
Statutes—	
After Reformation,	417
1644-1663,	420
Of 1663,	422 <i>et seq.</i>
Summary removing,	247, 455
Temple Lands,	446
Temporal Lands,	421, 436, 437, 442
The Glebe Lands (Scotland) Act, 1866,	479, 517, 653
Title to,	461
Trees,	476
Trial of question of right,	473
Union of Parishes,	34, 35, 249
United Parishes Act, 1876,	486
Warrandice against designation,	452
What Ministers entitled to,	424
What it consists of,	427
Whence and by whom provided,	435
Glebe Lands (Scotland) Act, 1866,	479, 517, 653
Grain. See <i>Victual</i> .	
Grass —	
In Churchyards,	207
Minister's. See <i>Minister's Grass</i> .	
Grass Glebe. See <i>Glebe</i> .	
Grave. See <i>Churchyard</i> .	
Heritors —	
Appeal—	
Against Resolution,	531
Against Order of Presbytery. See <i>Appeal</i> .	
Aqueduct,	513
Assessments. See <i>Heritors' Assessments</i> .	
Beadle's Appointment,	606, 607
Beadle's Salary,	609

	PAGE
Heritors — <i>continued</i> .	
Burghal Parish,	516
Church. See <i>Church</i> .	
Churchyard—	
Allocation among,	194
Burial, right of,	183
Excambion,	211
Kirk-Session,	199
Magistrates,	185
Maintenance,	186
Management,	184
Obligation to provide,	174
Property in,	203
Protection of,	190
Relief among, on designation,	179
Right of Burial,	183
Title,	204
Title of individual to protest,	191
Citation by Presbytery,	565
Clerk,	522
Collector,	548
Committee,	534, 548
Communion Elements,	618
Compulsitor by Presbytery,	131
Consent—	
To Disjunction and Annexation,	41
To Disjunction and Erection,	45, 47
To Excambion of Glebe,	468
To Union,	26
Corporate character,	518
Curator,	521, 527
Custodians of Church,	147
Dissentient,	531, 533
Doorkeeper of Church, Appointment of,	606-9
Double relation to fabric of Church,	142
Duty to provide Bell, Pews, and Sacramental Furniture,	137, 139
Ecclesiastical Assessments (Scotland) Act, 1900,	545, 676
Ecclesiastical Buildings and Glebes (Scotland) Act, 1868,	517, 541, 662
Effect of Annexation,	39, 41, 42
Effect of Union,	34
Expenses,	534, 591
Family Pew,	152
Female,	526
Feudal Title not necessary,	513
Glebe. See <i>Glebe</i> .	
Glebe Lands (Scotland) Act, 1866,	479, 517, 653
Guardians of Church,	148
Incorporate Company,	513
Insane or Pupil,	528
Keys of Church,	608
Landward-Burghal Parish,	514, 542
Leaseholder,	512
Letting of Pews,	160, 162
Liability for expenses,	534, 591
Liferenter,	511

Heritors—continued.

PAGE

Litigation and Liability,	534
Magistrates,	514, 516
Manse. See <i>Manse</i> .	
Meaning of term,	510
Meetings. See <i>Heritors' Meetings</i> .	
Minister's Grass. See <i>Minister's Grass</i> .	
Minor,	521, 526
Parishioner construed to mean,	105
Pews. See <i>Seats in Church</i> .	
Plans submitted to Presbytery,	129, 578
Precentor's Salary,	611
Presbytery. See <i>Presbytery</i> .	
Quasi-Corporation,	518
Quorum,	533
Resolution—	
Appeal,	531
Presbytery,	531, 533
Redress,	531, 533
Right—	
To allocation,	158
In Pews,	159
Seats in Church. See <i>Seats in Church</i> .	
Servants' Pew,	154
Special meanings of term,	517
Superior,	512
Tenants' Pews,	152, 154, 161
Titular,	511
Who are,	111, 510

Heritors' Assessments—

Borrowing,	549
Collector,	548
Decree of Presbytery,	581-2
Dissenting Churches, &c. exempt,	545
Ecclesiastical Assessments (Scotland) Act, 1900,	545, 676
Ecclesiastical Buildings and Glebes (Scotland) Act, 1868,	541, 662
History of law,	536 <i>et seq.</i>
How levied,	548
Lands Valuation (Scotland) Act, 1854,	540
Landward-Burghal Parish,	542
Permission to maintain old method,	545
<i>Quoad sacra</i> Annexations,	546
<i>Quoad sacra</i> Erections,	547
Real Rent,	540
Rebate on £50,	546
Rules,	535
Rural Parish,	536, 540
Urban Parish,	538
Valued Rent,	8, 517, 535
When Church already allocated,	541

Heritors' Meetings—

Adjourned,	521
Appeal,	531
Casting Vote,	528
Chairman,	522

	PAGE
Heritors' Meetings—continued.	
Chairman's Vote,	528
Clerk,	522
Committee,	534, 548
Convening,	519, 521
Curator,	521, 527
Dissent,	531, 533
Female,	526
Guardians,	521, 527, 528
Insane or Pupil,	528
Minor,	521, 526
Minute,	523
Notice to Guardians and Agents,	521
Presbytery convening,	521
Process,	525
Quorum,	533
Recall of resolution,	532
Redress,	531, 533
Resolution—	
Appeal,	531
Effect of,	531
Presbytery,	531
Redress,	531, 533
Regular, binds all,	522
Vote,	524
Vacancy of Cure,	521
Voting,	524
When Presbytery desire,	521
Hospital and College Lands,	444, 445
Income Tax,	250
Incorporate Acres,	10, 422, 447, 492
Incumbent. See <i>Minister.</i>	
Induction—	
Assistant and Successor,	96
Canon Law,	90
Civil Courts' interference,	99
Historical significance of ceremony,	89
Stipend, right to follows upon,	300
Without valid Election,	97
Inferior Church Officers,	606
Infield,	431, 498
Insanity—	
Of Minister,	350
Of Heritor,	528
Interest—	
On arrears of Stipend,	347
Introduction of Parishes,	3
Jurisdiction. See <i>Presbytery.</i>	
Jus Devolutum,	86
Keys of Church,	608
Kirk-Session—	
Church-Door Collections,	595
Churchyard,	199
Clerk. See <i>Session Clerk.</i>	
Communion Roll,	85

	PAGE
Kirk-Session — <i>continued.</i>	
Constitution,	592
Dues,	604, 631
Duties,	592
Ecclesiastical Charities,	602
Extracts from Records,	614
Fines,	631
Guardians of Church,	147
Local Government (Scotland) Act, 1894,	602, 674
Mortification for Poor,	594
Officer,	606
Parish Charities,	600
Poor Law,	593
Poor Law (Scotland) Act, 1845,	594, 600
Poor's Roll,	604
Precentor's Appointment,	610
Quorum,	599
Records,	613, 614
Revision of Communion Roll,	85
Session House,	604
Lairs —	
Allocation of, in Churchyard,	193
Lands Valuation (Scotland) Act, 1854,	540
Landward Parish,	7, 8
Landward-Burghal Parish,	7, 8
Allocation of Pews,	150, 157
Assessments,	374, 542
Churchyard—	
Allocation,	196
Burial-Grounds (Scotland) Act, 1855,	222, 642
Magistrates,	185, 191
Management,	185
Glebe,	426
Heritors,	514
Manse,	363, 367, 373, 374
Minister's Grass,	493
Seat-Letting,	164
Layman —	
Cannot plead thirteen years' possession,	264
Lease —	
Of Glebe,	479 <i>et seq.</i>
Leaseholder,	512
Letting of Pews,	160, 162, 164, 166
Liferenter,	511
Litigation —	
Heritors' liability,	534
Local Government (Scotland) Act, 1894,	602, 674
Locality,	293-329
Common Agent,	294
Interim,	330
Lords of Session —	
As Teind Commissioners,	24, 29
Magistrates —	
Assessments. See <i>Heritors' Assessments.</i>	
Burghal Church, Maintenance,	165

	PAGE
Magistrates—continued.	
Churchyard, Allocation of,	196
Heritors,	514, 516, 542, 544
Guardians of Church,	148
Landward-Burghal Parish. See <i>Landward-Burghal.</i>	
Seats. See <i>Seats in Church.</i>	
Manse—	
Accommodation,	374, 400, 402
Act 1663 draws back to 1649,	361
Action to decide right,	407
Allodial,	364
Assessment. See <i>Heritors.</i>	
Burghal Churches excepted,	359, 363, 366
Burghal-Landward. See <i>Landward-Burghal.</i>	
Collegiate Charge,	370
Cost, maximum,	360, 377
Designation,	409, 563
Enlargement,	398
Procedure,	575
Free Manse,	383, 385
Constructive,	390
Decree of,	387, 388, 570
Ministers' liability,	383, 391
Repair of,	392, 394
Sheriff's Decree,	388
Heritors' obligations,	371
Extent of, for new Manse,	377
Not <i>debita fundi</i> ,	372
Not public burden,	373
Not dependent on occupation of Church,	372
Repairs,	392
How provided prior to Reformation,	352
How provided subsequent to Reformation,	353
How provided after 1644,	364
Garden Wall,	376
Landward Parish,	366
Landward-Burghal Parish,	363, 367, 373
Manse Maill,	410
Minister's Dwelling-house which is not Manse,	388, 408
Ministers entitled to,	366
Minister's liability to uphold,	383, 391
Minister's obligation to reside in,	415
Nature of Minister's right,	406
Origin of,	352
Parish—	
Where Manse must be provided,	366
<i>Quoad sacra</i> ,	53, 54, 414
Parliamentary Church,	414
Possession for thirteen years,	264
Presbytery—	
Designation,	409
Jurisdiction,	362
Procedure,	574 <i>et seq.</i>
Site of Manse, choice of,	403
Visitation,	410, 565, 577

	PAGE
Manse — <i>continued</i> .	
Procedure,	407, 410
<i>Quoad sacra</i> Parish,	53, 54, 414
Rates,	250-252, 629
Rebuilding,	395
Procedure,	576
Reconstruction,	397
Removal, summary,	247
Repairs—	
Heritors' liability,	392
Minister's liability,	383, 391
Old law,	357
Procedure,	410, 574
Repairable,	395
Report by men of skill,	566, 575
Residence, Minister's obligation of,	415
Site,	403
Feuing of,	415
Size,	374, 400, 402
Statutes,	353 <i>et seq.</i>
Sufficiency of,	377, 386, 400
Summary removal,	247
System—	
Under 1612 Act,	356
Under 1644 and 1649 Acts,	358
Under 1663 Act,	360
Tenure,	364
Thirteen years' possession,	264
United Parish,	34, 35
Vacant Stipend formerly used for Repairs,	393
Visitation by Presbytery,	410, 565, 577
Water Supply,	403, 629
What constitutes in law,	408
When Minister entitled to entry,	246
Marriage Dues ,	631
Meetings —	
In Church,	144
Heritors. See <i>Heritors' Meetings</i> .	
Mensal Churches ,	74
Minerals —	
Under Churchyard,	206
Under Glebe,	477
Minister —	
Appointment by Congregation,	84
Bankruptcy,	349
Burial right,	183
Control of Worship,	147
Communion Elements,	623
Custody of Church,	147
Elect—	
Admission,	95
Call,	93
Ordination,	95
Trials,	92
Election. See <i>Election</i> .	

Minister—*continued.*

PAGE

Glebe.	See <i>Glebe.</i>	
Induction.	See <i>Induction.</i>	
Insanity,	.	350
Keys of Church,	.	607
Liferenter, how far a,	.	239
Manse.	See <i>Manse.</i>	
Pew,	.	155
Possession.	See <i>Possession.</i>	
Prescription.	See <i>Prescription.</i>	
Protection of Benefice,	.	242
<i>Quoad sacra</i> Parish,	.	556, 629
Rates,	.	250, 629
Stipend.	See <i>Stipend.</i>	
Stipendiary,	.	238, 281
Suspension, Stipend in case of,	.	351
Taxes,	.	250
Temporality, interest in,	.	239
When right to Benefice ceases,	.	248
When right to Benefice emerges,	.	246
Minister's Man,	.	606
Ministers' Widows Fund (Scotland) Act, 1779,	.	309
Minister's Grass,	.	488
Additional to Glebe,	.	490
Arable Lands,	.	492
Meaning of term,	.	494
Church Lands,	.	492 <i>et passim</i> ch. xi.
Relief among,	.	506
Date for fixing character of ground,	.	499
Designation,	.	492, 493, 500 <i>et seq.</i> , 568
Order of,	.	500
Extent of,	.	489
Heritors.	See <i>infra, Relief.</i>	
Incorporate Acres,	.	492
Landward-Burghal Parish,	.	493
Money equivalent,	.	493, 502-5
Relief of,	.	507, 569
As bar to claim,	.	503
Presbytery—		
Designation,	.	492
Sanction of Money equivalent,	.	503
Provision of—		
Under 1649 Act,	.	488
Under 1663 Act,	.	499
Proximity to Manse,	.	500
Relief among Heritors,	.	493, 506, 569
Of Money allowance,	.	507
Temporal Lands,	.	508
Temporal Lands,	.	492, 508
To whom claim competent,	.	492
Warrandice clause,	.	509
When Heritors must provide,	.	502
Where Glebe extra large,	.	490-2
Minor Heritor,	.	521, 526

	PAGE
Moderator—	
Of Kirk-Session,	592
Failure of duty at Election,	87
Of Presbytery,	551
Modification. See <i>Stipend</i> .	
Montrose Churches,	168, 298
Mortcloths,	215
Mortifications—	
For Poor,	594 <i>et seq.</i> , 601
Stipend from,	298
Mortified Glebe Lands,	433
New Parish. See <i>Erection</i> .	
New Parishes (Scotland) Act, 1844,	53, 663
Non-Parochial Territory,	7
Oath—	
Evidence upon,	566, 577
Ordination,	95, 97
Power of Civil Court,	99
Organist,	611
Origin of Parishes,	1
Outfield,	431
Over-payments of Stipend,	340
Parish—	
Action of Commissions,	5
Alterations—	
By Bishops,	6
By Commissions,	18
By the Crown,	6
By Parliament,	16, 20, 24
By Teind Court,	24
Annexation. See <i>Annexation</i> .	
Burghal,	7, 8
See <i>Burghal</i> .	
Burghal-Landward. See <i>Landward-Burghal</i> .	
Classification of,	7
Creation of new,	15
Definition of,	6
Disjunction. See <i>Erection</i> .	
Distinction between <i>quoad omnia</i> and <i>quoad sacra</i> ,	30
Erection. See <i>Erection</i> .	
Introduction into Scotland,	3
Landward,	7, 8
Landward-Burghal. See <i>Landward-Burghal</i> .	
Origin of,	1
<i>Quoad sacra</i> . See <i>Quoad sacra</i> .	
<i>Quoad omnia</i> ,	7
Readjustments after Reformation,	5
Rural,	8
Union. See <i>Union</i> .	
Urban,	8
Parish Church. See <i>Church</i> .	
Parish Charities,	600
Parish Council—	
Burial-Grounds,	216
Parishioners. See <i>Heritors</i> .	

	PAGE
Parliament—	
Parochial alterations by,	16, 20, 24
Parliamentary Churches,	296
Ann,	307
Erection <i>quoad sacra</i> ,	62
Erection <i>quoad omnia</i> ,	64
Manse,	414
Widows Fund,	311
Parliamentary Commission.	See <i>Commission</i> .
Parliamentary Districts—	
Erection as Parishes,	61, 64
Nature of,	62
Parochial Alterations,	15
Powers of Teind Court,	42
Parochial Burdens—	
Effect of Annexation,	39, 41, 42
See also <i>Heritors' Assessment</i> .	
Parochiners—	
Mean Heritors,	186
Parsons—	
Abolition of,	106, 108
Communion Elements,	618
Liability for upkeep of Church,	104, 106, 107
Parsons' and Vicars' Lands,	439, 447
Parsonage Teinds,	274
Parts and Pertinents of Church,	137
Pasturing—	
In Churchyards,	189
Patronage,	73
Abolished temporarily,	77
Abolished finally,	84
Books of Discipline,	75
Collation,	74
Common Churches,	74
Compensation,	631
Ecclesiastical,	73
Feudalisation,	81
Laic,	73
Mensal Churches,	74
Origin of,	73
Personal right,	81
Presentation a different right,	80
Reformers' views,	75
Restored 1711,	79
Patronage Abolition Act, 1874,	84, 669
Patronate Benefices,	74
Pew.	See <i>Seats in Church</i> .
Plans.	See <i>Heritors, Presbytery</i> .
Plat—	
Commission of,	277, 279
Pluralities,	5, 248
Poor—	
Alteration of Parishes,	51
Charities,	600
Kirk-Session,	593

	PAGE
Poor — <i>continued.</i>	
Meaning of term,	601
Poor Rates —	
Minister's,	251
Poor Law (Scotland) Act, 1845,	594, 600
Poor's Roll,	604
Possession —	
Seven years,	266
Thirteen years,	255
Thirty years,	267
Possessory Judgment,	266
Possessory Rights of Churchmen,	252
Precentor —	
A private Officer,	611
Appointment,	610
Duties,	610
Organist,	611
Salary,	611
Presbytery —	
Admission by. See <i>Induction.</i>	
Appeal. See <i>Appeal.</i>	
Assessments,	581
Augmentation, Citation,	321
Bequests to Church,	557
Chapel Ministers,	553
Church. See <i>Church.</i>	
Church Property,	557
Churchyard. See <i>Churchyard, Designation.</i>	
Citation of,	321, 552
Of Heritors by,	565
Clerk,	551
Constitution,	551
Contract for Work,	580
Decree for Assessments,	582
Designation. See <i>Designation.</i>	
Elders,	551
Examination on Oath,	566, 577
Executing its own Orders,	579
Expenses,	591
Free Manse,	387, 388, 570
Glebe. See <i>Glebe.</i>	
Guardians —	
Of Church,	148
Of Church Property,	557
Heritors. See <i>Heritors.</i>	
Appeal,	583
Citation of,	565
Delay by,	579
Plans,	129, 578
Represented by Presbytery,	580
Holden and reputed Member,	555, 569
Induction. See <i>Induction.</i>	
Jurisdiction,	556
Churches,	116
Extent and value of,	562

	PAGE
Presbytery — <i>continued</i> .	
Origin of,	558
<i>Jus Devolutum</i> ,	86
Majority,	552
Manse. See <i>Manse</i> .	
Measurement of ground,	568
Member of,	551, 553
Minister's Grass. See <i>Minister's Grass</i> .	
Moderator,	551
Ordination,	95, 97, 99
Origin,	551
Plans,	129-131, 578
Procedure—	
As regards Buildings,	576
In Appeals,	585
<i>Quoad sacra</i> Ministers and Elders,	556
Rebuilding and Repairing,	129
Procedure,	574, 576
Reports on Buildings,	577
Cost of,	591
Representative of Heritors,	580
Requisition in regard to Buildings,	564, 575, 576
Review. See <i>Appeal</i> .	
Title—	
To appear in Appeal,	584
To vindicate Property,	557-8
Trial of Minister-elect,	92
Visitation,	410, 565, 577
Union of Parishes,	32
When Heritors neglect duty,	131
Prescription. See <i>Decennalis</i> .	
Thirty years,	267
Forty years,	269
Glebe,	463, 465, 628
Right to Burial,	220
Stipend,	312
Teinds,	338, 343
Presentation,	73
<i>Alternis vicibus</i> ,	83
Collation,	74
Nature of right,	82
Not identical with Patronage,	80
Union of Parishes,	83
Private Burial-Grounds,	218
Privy Council —	
Act of 1563 <i>re</i> Churches,	104, 115, 116
Proxies,	525
Public Burial-Grounds,	216
Pupil Heritor,	528
Quinquennial Prescription —	
Of Stipend,	312
Quoad Omnia Parish,	7
See <i>Annexation</i> , <i>Erection</i> .	
Quoad Sacra Parish,	7
Annexation. See <i>Annexation</i> .	

	PAGE
Quoad Sacra Parish — <i>continued.</i>	
A proper Parish,	59, 629
Church—	
Collections,	599
Maintenance,	53
Provision of,	110
Seat Rents,	54
Title to,	110
Constitution,	59, 630
Endowment,	296
Erection. See <i>Erection.</i>	
Manse,	414
Minister—	
Poor Rates,	251
Presbyter,	556
Status,	629
Stipend,	53, 296
Trustees,	58, 59
Widows Fund,	311
Quorum —	
Of Heritors,	533
Of Kirk-Session,	592
Rates —	
Minister's liability,	250, 252, 629
Rating of Benefice,	250
Real Rent,	540
Re-allocation of Graves,	197
Rebuilding. See <i>Church Manse.</i>	
Reclamation of Teinds,	342
Records —	
Of Session,	613
Reformation —	
Alienation of Benefices,	275
Change in rights of Churchmen,	103
Provision of Churches prior to,	101
Statutes passed in regard to Churches,	104
Transfer of Churchyards at,	173
Regality —	
Burgh of,	9
Relief. See <i>Churchyard, Glebe, Minister's Grass.</i>	
Remit —	
To man of skill,	587, 589
Rent —	
Real,	540
Valued,	8, 517, 535
Repairs. See <i>Church, Manse.</i>	
Repairable. See <i>Church, Manse.</i>	
Rescissory Acts,	22
Resolution. See <i>Heritors' Meetings.</i>	
Road Rates,	252
Roman Burial,	170
Royal Burgh. See <i>Burgh.</i>	
Rural Parish,	8
Sacrament. See <i>Communion.</i>	
Sacramental Furniture,	137, 139, 626, 627

	PAGE
St. John's Lands,	446
Sale. See <i>Churchyard.</i>	
Salmon Fishing—	
Glebe,	473
Thirteen years' possession,	264
School Rates,	251
Seats in Church,	137
Accommodation,	135
Action to try right,	158
Allocation—	
Appeal,	159
By Sheriff,	157
Evidence,	542
Extrajudicial,	157
In Burghal Church,	166
In Landward Church,	151
In Landward-Burghal Church,	150, 157
In Urban Church,	149
Judicial,	157
Order of choice,	151
Procedure,	156
Application of Rent,	163, 166
Dimensions,	135, 137
Elders' Pew,	155
Family Pew,	152
Heritable character of right,	168, 169
Heritors. See <i>Heritors.</i>	
Landward-Burghal Church,	150, 157, 164
Letting of,	160, 162
In Burghal Churches,	166
In Landward-Burghal Parish,	164
In Parish <i>quoad sacra</i> ,	54
Magistrates—	
Allocation of Seats,	150, 157, 166
Pew,	166
Minister's Pew,	155
Obligation to provide,	137
Pertinent of Land,	161
Presbytery. See <i>Presbytery.</i>	
Rent. See <i>Letting, supra.</i>	
Right—	
To allocation, nature of,	158
In Pews,	159
To occupy,	160
Servants' Pew,	154
Size of,	135, 137
Superior has no right,	155
Tenants,	152-4, 161
Whence right derived,	160
Second Minister. See <i>Collegiate Charge.</i>	
Sepulture. See <i>Burial.</i>	
Servants' Pew,	154
Servitude—	
Glebe,	472
On sale of Glebe,	481

	PAGE
Session. See <i>Court of Session, Kirk-Session.</i>	
Session Clerk,	612
A Public Officer,	614
Appointment,	612
Baptismal Register,	616
Church Register,	612
Custody of Records,	613
Dues,	616
Duties,	613
Extracts,	614
Interim,	614
Tenure of Office,	615
Session House,	604
Session Officer,	606
Seven Years' Possession,	266
Sheriff—	
Allocation of Church Area,	157
Appeal. See <i>Appeal.</i>	
Churchyard,	191
Free Manse,	387
Site. See <i>Church, Designation.</i>	
Sittings. See <i>Seats in Church.</i>	
Small Stipends Acts,	297, 299
Ann,	307
Glebe,	435
Widows Fund,	312
Soum,	430
Spirituality of Benefice,	230, 289
Minister's right,	238
Statute—	
Burial-Grounds (Scotland) Act, 1855,	221, 642
Church of Scotland Courts Acts, 1863,	350, 651
Church Patronage (Scotland) Act, 1874,	84, 669
Ecclesiastical Buildings and Glebes (Scotland) Act, 1868,	517, 541, 662
Ecclesiastical Assessments (Scotland) Act, 1900,	545, 676
Glebe Lands (Scotland) Acts, 1866,	479, 517, 653
Lands Valuation (Scotland) Act, 1854,	540
Local Government (Scotland) Act, 1894,	602, 676
Ministers' Widows Fund (Scotland) Act, 1779,	309
New Parishes (Scotland) Act, 1844,	53, 633
Poor Law (Scotland) Act, 1845,	594, 600
Small Stipends Acts,	297, 299, 307, 312, 435
United Parishes (Scotland) Act, 1868,	64, 662
United Parishes (Scotland) Act, 1876,	486, 673
Steeple,	140
Stent Roll,	12
Stipend—	
Alimentary, how far?	348
Assistant and Successor,	325
Augmentation. See <i>Augmentation.</i>	
Bankruptcy,	349
Belhaven Act,	350
<i>Bona fide</i> Consumption,	100
Burghal Churches,	297

Stipend—*continued*.

	PAGE
Cessio,	349
Charge for payment,	336
Collegiate Charge,	290, 315
Conversion of Victual,	321
Commission of Plat,	275
Commission of 1606,	279
Commission of 1617,	279, 281
Commission of 1621,	282
Commission of 1627,	283
Commission of 1633,	284
Commissions 1641-93,	285
Commission to Court of Session,	286
<i>Debitum Fructuum</i> ,	292
Debt, attachment for,	348
Dereelinquishment,	339
Diligence,	348
Exchequer Livings,	297
Fiars Prices,	332
Income Tax,	250
Insanity of Minister,	350
Interest,	347
Local, when introduced,	279
Locality. See <i>Locality</i> .	
Meaning of term,	289
Modification,	290, 293, 295, 314
Mortified,	298
Over-payments,	340
Parliamentary Church,	296
Poor Rates,	251
Practice of Court 1707-1808,	287
Prescriptive right to,	338, 343
Quinquennial Prescription of,	312
<i>Quoad sacra</i> Parish,	53, 296
Re-augmentation,	288
Reclamation of Teinds,	342
Reformed Clergy's right,	280
Small Stipends Acts,	297, 299
Sources of,	290
Spirituality of Benefice,	289
Suspension of Minister,	301, 351
Teinds as a source of,	290
See also <i>Teinds</i> .	
Terms of vesting,	302
Thirds,	275
Union of Parishes,	33, 34
Vacant Stipend. See <i>Vacant Stipend</i> .	
Vesting of,	302
Victual,	295, 319, 321, 331
When right ceases to old Minister,	301
When right emerges to new Minister,	300
Stipendiary ,	238, 281
Submission, Teind ,	284
Summons . See <i>Augmentation</i> .	

Superior—	
Not Heritor,	512
Burial,	183
Pew,	155
Surrender of Teinds,	334
Suspension of Minister,	301, 351
Tacks—	
Of Benefices,	232
Taxation—	
Of Benefice,	250
Teinds—	
Assumption of Thirds,	275
Augmentation. <i>See Augmentation.</i>	
Church Repairs,	102, 104, 107
Commission to Court of Session,	286
Commissions. <i>See Commission.</i>	
Communion Elements,	625
Decreet-Arbitral of 1629,	284
Derelinqishment,	339
Fiars Prices,	332
Free or Surplus,	314, 322
Locality. <i>See Locality.</i>	
Origin of,	271
Over-payments,	340
Parsonage,	274
Personal,	273
Plat, Commission of,	279
Predial,	273
Prescriptive right,	338, 343
Reclamation,	342
Stipend. <i>See Stipend.</i>	
Submissions,	284
Surrender,	334
Thirds,	103, 275
Valued,	284, 334, 339
Vicarage,	274
Teind Commissions. <i>See Commission.</i>	
Teind Court—	
Annexation. <i>See Annexation.</i>	
Churchyards,	212
Constitution of,	24, 29
Erection. <i>See Erection.</i>	
Institution of present,	287
Parties to proceedings,	25
Powers of,	24, 42
Practice,	287
Temple Lands,	446
Temporal Lands. <i>See Glebe, Minister's Grass.</i>	
Temporality of Benefice,	230, 239
Minister's right,	239, 243
Tenants' Pews,	152-4, 161
Thirds of Teinds,	19, 103, 275
Title. <i>See Possession, Prescription, Decennialis.</i>	
Titular—	
Burial,	183

	PAGE
Titular — <i>continued</i> .	
Not an Heritor,	112, 511
Tombstones ,	187, 201, 218
Transportation —	
Of Church,	136, 630
Of Churchyard,	210
Trees —	
In Churchyard,	207
In Glebe,	476
Trial of Minister-elect ,	92
Trustees —	
In Parish <i>quoad sacra</i> ,	58, 59
Union of Parishes —	
Prior to 1617,	16
By Parliamentary Commissions, 1617-1707,	18
By Court of Teinds,	26
Church of United Parish,	35
Churchyard,	212
Conditional Union,	33, 36
Effect of Union,	32
Glebe,	34, 35
Grounds for Union,	30
Heritors, how affected,	34
Manse,	34, 35
Parties interested,	31
Presentation,	83
Stipend,	33, 34
United Parishes (Scotland) Act, 1868 ,	64, 660
United Parishes (Scotland) Act, 1876 ,	486, 673
Urban Parish ,	8
Use of Church ,	143, 145, 146
Vacant Stipend —	
History of Law,	307
Formerly for Manse Repairs,	393
Prescription of Claim,	313
What it includes,	312
When it arises,	307
Widows' Fund,	309
Valuation of Teinds ,	284, 334, 339
Valued Rent ,	8, 11, 517, 535
Vestry ,	605
Vicarage Teind ,	264, 274
Victual —	
Augmentations modified in,	331
Conversion to Money,	321
Stipend modified in,	295, 319
Visitation —	
By Presbytery,	410, 565, 577
Voting ,	524, 528
Wakening —	
Of Augmentation,	321
Widows' Fund —	
<i>Quoad sacra</i> Parish,	311
Parliamentary Church,	311
Vacant Stipend,	309

